TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED AUGUST 20, 1917.

(26,123)

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1 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

At a stated term of the District Court of the United States, within and for the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the third day of said month, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

Present: Honorable D. C. Westenhaver, U. S. District Judge.

Among the proceedings then and there had were the following, to-wit:

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

Be it remembered that heretofore, to-wit: on the 27th day of June, A. D. 1917, came a Grand Jury of the United States, to wit: A. H. Babcock, E. K. Bebb, Henry Brunner, James W. Butler, Hugh Collins, George F. Copeland, Charles Dreiblebis, D. E. Graver, Charles H. Krauter, John E. Main, James Miers, Charles A. Miner, W. W. McIntosh, Julius Renker, C. K. Russell, Adam J. Stiefel, Emmet F. Taggart, W. H. Thompson, J. B. Trall, Fred Witt, which said Grand Jury returned an Indictment, endorsed "A True Bill, Emmet F. Taggart, Foreman of Grand Jury," which Indictment is in the words and figures following, to-wit:

2 (*Indictment.*)

In the District Court of the United States of America for the Northern District of Ohio, Eastern Division, of the April Term, in the year 1917.

No. 3873. Criminal.

NORTHERN DISTRICT OF OHIO,
Eastern Division, ss:

The Grand Jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Ohio, at the April Term thereof in the year 1917, and inquiring for that division and district, upon their oath present that Alphons J. Schue on June 5, 1917, at Cleve-

land, in said division and district, was a male person between the ages of twenty-one and thirty both inclusive, to wit, a male person who then had attained his twenty-first birthday and who did not on that day attain and had not before then attained his thirty-first birthday, and as such person was then and there required, by the Proclamation of the President of the United States dated May 18, 1917, to present himself for and submit to registration, under the Act of Congress approved May 18, 1917, and entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," at the regular registration place in the city of Cleveland, 4th ward, precinct "L" in said division and district, between 7 A. M. and 9 p. m. on said June 5, 1917, that precinct then being the precinct wherein said Alphons J. Schue then had his permanent home and actual place of legal residence, from which he was not then temporarily absent; that said Alphons J. Schue so then and there being such person, unlawfully did wilfully fail and refuse so then and there to present himself for registration
3 and to submit thereto as in said Act provided and in said Proclamation appointed; he the said Alphons J. Schue then and there not being an officer or an enlisted man of the Regular Army, of the Navy, of the Marine Corps, or of the National Guard or Naval Militia in the service of the United States, or an officer in the Reserve Corps or an enlisted man in the Enlisted Reserve Corps in active service; and that Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker each late of Cleveland aforesaid, and each well knowing said Alphons J. Schue to be such person subject to such registration, at Cleveland aforesaid, in said division and district, before and at the time of his so doing, unlawfully did aid, abet, counsel, command and induce said Alphons J. Schue in so unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto as aforesaid, and procure him to commit the offense involved in his so doing; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

E. S. WERTZ,
United States Attorney.

(Endorsement:) No. 3873. District Court of the United States for the Eastern Division of the Northern District of Ohio. The United States vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker. Indictment. For violation of Act of May 18, 1917. A True Bill. E. F. Taggart, Foreman of Grand Jury. E. S. Wertz, U. S. District Attorney. Filed Jun- 27, 1917. B. C. Miller, Clerk, U. S. District Court N. D. O.

4 *Challenge to the Array of the Grand Jury and Petit Jury.*

(Filed July 14, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Challenge to the Array of the Grand Jury and Petit Jury.

Come defendants Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, and by leave heretofore granted withdraw their pleas heretofore entered.

Said defendants represent to the Court that they were indicted by the alleged grand jury herein without any sworn charge having been filed against them and without any preliminary examination and therefore had no knowledge or means of knowledge of any criminal proceedings contemplated by said alleged grand jury, and had no opportunity to challenge the array of said grand jury before it was impaneled and sworn.

Said defendants now challenge the array of said alleged grand jury herein, and the array of the petit jury herein, and move the court for an order declaring both panels null and void and the proceedings had by said alleged grand jury null and void, for the defects and errors in the selecting, drawing, summoning, and choosing of said panels and juries, hereinafter set forth, same being prejudicial to these defendants, to wit:

5 I. That the names of all persons selected for jury service in this court were selected and put in the jury-box by two men appointed a commission for that purpose solely on political consideration and because of their prominence in partisan politics as members of the largest two political parties of this judicial district, to-wit, the Republican and Democratic Parties. That defendants are members and officers of the Socialist Party, a minor political party in said district, which was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said members and officers and a part of their propaganda to defeat said Republican and Democratic Parties at the polls and deprive the partisans of said parties, including said commissioners, of political office; that the platforms and principles of said Republican and Democratic Parties are opposed to the platform and principles of said Socialist Party, and said two jury commissioners as partisans of said two

first-named parties, appointed on partisan consideration, are and of necessity must be hostile to and prejudiced against these defendants.

2. That all the names selected and put in the jury-box were names of adherents of said Republican and Democratic Parties exclusively, and did not include the names of any adherents of the Socialist Party to which defendants belong, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist party. That all the persons selected for jury service were and are, by reason of their adherence to said Republican and Democratic Parties and
6 for other reasons, hostile to and prejudiced against these defendants as members of the Socialist Party and against the political propaganda which constitutes the alleged offense of these defendants. That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries will deprive them of their constitutional rights to the equal protection of the law, to justice, to trial by an impartial jury, to due process of law; and will be contrary to Sec. 275 Judicial Code, and contrary to the grant of equal rights under the Act of May 31, 1870, c. 114, sec. 16.

3. That the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of landowners, property-owners, and capitalists; that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners, and capitalists. That defendants are all proletarians, that is to say, landless and propertyless wageworkers, with interests adverse to those of landlords, employers, and capitalists; that the propaganda aforesaid constituting the alleged offense of these defendants advocates the rights of proletarians as opposed to those of landlords, employers, and capitalists, and urges the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury-box. That said jurors so drawn are and of necessity must be by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition. That there were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest,
7 or Profit and would therefore not be rendered hostile to and prejudiced against defendants because of their private interests, but said persons are excluded from said jury service. That to permit defendants to be indicted and tried by juries so selected and drawn will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 of the Judicial Code.

4. That said juries have been selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

5. That the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor refilled since November, 1916, many months prior to said drawings; that many juries have been drawn from said box since said November, and no evidence is obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, sec. 276. That many of the names now in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who has not held office for *for* more than a year past. That of the persons sitting on said alleged grand jury three (3) had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three (3) had been so selected and their names put in said box by said Sullivan; and said Sullivan's term had expired prior to said drawings; and the names of said six jurors had not been selected and put in the box by either of the persons authorized to do so at the time of said drawings or at the time the order
8 for said drawings was issued. Contrary to Sec. 276 Judicial Code.

6. That the Marshal and his Deputy who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council.

7. That the jury-box used for said drawings was small and rectangular and incapable of being rotated so as to shake together and mingle the names; that there was in fact no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings. That said Clerk did in fact select from said box the names exclusively of adherents of the political parties adverse to that of the defendants and of persons likely to be and in fact hostile to and prejudiced against these defendants. That thereby defendants have been deprived of their constitutional right of due process of law and of trial by an impartial jury of their peers.

8. That *such all* portion of said juries as resided outside the city of Cleveland were summoned by mail; that the actual delivery of the summons in such cases was not by any officer of the court or other qualified person, but by a person unknown, to-wit, a letter-carrier; that twenty-two were thus summoned by mail for said grand jury, and fourteen thereof accepted and sworn; that fifteen
9 were thus summoned by mail for said petit jury. That of said grand jurors so summoned by mail and serving, seven were designated not by their Christian names but by initial only, and the summons mailed not to any street-number but simply to the town or city where such person was believed to reside; that of

the twenty-two thus summoned by mail for the grand jury, three were addressed to towns of which the names were misspelled or which do not exist in Ohio, to-wit: D. E. Graver, "East Claredon, Ohio," Harry J. Griffin, "Copely, Ohio," and P. E. Wigton, "Lucas, Ridgeland County, Ohio" (there being no Ridgeland County within the jurisdiction of this court or in Ohio), and of these one D. E. Graber (a different name) was sworn in and served. That of the fifteen thus summoned by mail for the petit jury, two were addressed to towns which either do not exist in Ohio or the names of which were mis-pelled, to-wit, H. E. Cogsil, "Kilgour, Ohio," D. W. Millinger, "Leonia, Ohio," and one was addressed as follows, "R. B. Richards, Kent," (without designating any state), there being numerous towns of that name in the United States, notably in Connecticut, Illinois, Indiana, and Iowa; and two were addressed as follows, "A. C. Beels, Burton, Ohio," and "Allen Mills, Burton, Ohio," there being one town named "Burton" in Geauga County, and another town named "Burton City" in Wayne County, and there being no such names, spelt in such manner, among the persons named in the jury-box. Further, that of the fifteen persons summoned by mail for the petit jury, nine are designated not by their Christian names but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to reside. That by reason of the neglect of all safeguards both as to the manner of serving and the summons and the identity of the persons so summoned, defendants are deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District;

9. That there are nineteen counties composing the Eastern Division of the Northern District of Ohio, but that the Clerk in drawing the names for said grand jury did not draw any names from seven of said counties, to-wit, Ashland, Ashtabula, Carroll, Holmes, Medina, Tuscarawas, and Trumbull, but drew six from Cuyahoga; and in the grand jury as accepted nine counties were without representative. That in the drawing of names for said petit jury the Clerk has drawn 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but has not drawn any names from 8 counties within said Division, to-wit, Crawford, Holmes, Lorain, Mahoning, Richland, Summit, Tuscarawas, and Trumbull. That this unequal distribution of jurors and failure to select names from large portions of the territory within the District and confining such drawings to only a part of said District, is in violation of Sec. 277 of the Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

10. That both the grand and petit juries were special juries ordered for a special purpose; that by Sec. 281 of the Judicial Code the defendants above names, and that the facts set forth in the form as is required in such cases by the laws of Ohio, but failed so to do.

11. That said grand jury purported to be summoned under Sec. 284 of the Judicial Code and was summoned before the then acting

11 grand jury had been discharged, but the district attorney failed to certify in writing that the exigencies of the public service required it.

MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

STATE OF OHIO,
Cuyahoga County, ss:

Charles E. Ruthenberg, being duly sworn says that he is one of the defendants above named, and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed in my presence by the said Charles E. Ruthenberg this 14th day of July, A. D. 1917.

[SEAL.]

MORRIS H. WOLF,
Notary Public in and for Said County.

12 *Amended Challenge to the Array of the Grand Jury and Petit Jury.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Amended Challenge to the Array of the Grand Jury and Petit Jury.

Come defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and by leave heretofore granted withdraw their pleas heretofore entered.

Said defendants represent to the Court that they were indicted by the alleged grand jury herein without any sworn charge having been filed against them and without any preliminary examination and therefore had no knowledge or means of knowledge of any criminal proceedings contemplated by said alleged grand jury, and had no opportunity to challenge the array of said grand jury before it was impaneled and sworn.

Said defendants now challenge the array of said alleged grand

jury herein, and the array of the petit herein, and move the Court for an order declaring both panels null and void and the proceedings had by said alleged grand jury null and void, for the defects and errors in the selecting, drawing, summoning, and choosing of said panels and juries, hereinafter set forth, same being prejudicial to these defendants, to-wit:

1. That the names of all persons selected for jury service in this Court were selected and put in the jury-box by two men appointed a commission for that purpose solely on political consideration and because of their prominence in partisan politics as members of the largest two political parties of this judicial district, to-wit The Republican and Democratic Parties. That defendants are members and officers of the Socialist Party, a minor political party in said district, which was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said members and officers and a part of their propaganda to defeat said Republican and Democratic Parties at the polls and deprive partisans of said parties, including said commissioners, of political office; that the platforms and principles of said Republican and Democratic Parties are opposed to the platform and principles of said Socialist Party, and said two jury commissioners as partisans of said two first-named parties, appointed on partisan consideration, are and of necessity must be hostile to and prejudiced against these defendants.

13

2. That all the names selected and put in the jury-box were names of adherents of said Republican and Democratic Parties exclusively, and did not include the names of any adherents of the Socialist Party to which defendants belong, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist Party. That all the persons selected for jury service were and are, by reason of their adherence to said Republican and Democratic Parties and for other reasons, hostile to and prejudiced against these defendants as members of the Socialist Party and against the political propaganda which constitutes the alleged offense of these defendants. That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries will deprive them of their constitutional rights to the equal protection of the law, to justice, to trial by an impartial jury, to due process of law; and will be contrary to Sec. 276 Judicial Code, and contrary to the grant of equal rights under the Act of May 31, 1870, c. 114, Sec. 16.

14

3. That the names so selected and placed in said jury-box were taken exclusively or almost exclusively, from the names of land-owners, property-owners, and capitalists; that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners, and capitalists. That defendants are all proletarians, that is to say, landless and propertyless wage-workers, with interests adverse to those of landlords, employers, and capitalists; that the propaganda aforesaid constituting the alleged offense of these defendants advocates the rights

of proletarians as opposed to those of landlords, employers, and capitalists, and urges the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury-box. That said jurors so drawn are and of necessity must be by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition. That there were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest, or Profit and would therefore not be rendered hostile to and
15 prejudiced against defendants because of their private interests, but said persons are excluded from said jury service. That to permit defendants to be indicted and tried by juries so selected and drawn will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 of the Judicial Code.

4. That said juries have been selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

5. That the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor refilled since November, 1916, many months prior to said drawings; that many juries have been drawn from said box since said November, and no evidence is obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, sec. 276. That many of the names now in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who has not held office for more than a year past. That of the persons sitting on said alleged grand jury three (3) had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three (3) had been so selected and their names put in said box by said Sullivan; and said Sullivan's term had expired prior to said drawings; and the names of said six jurors had not been selected and put in the box by either of the persons authorized to do so at the time of said drawings or at the time the order for said drawings was issued, contrary to Sec. 276 Judicial Code.

16 6. That the Marshal and his Deputy who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council. And said Marshal did not summon nor return the entire venire of thirty (30) names as required by order of the Court and as drawn by the Clerk, but only nineteen (19) thereof.

7. That the jury-box used for said drawings was small and rectangular and incapable of being rotated so as to shake together and mingle the names; that there was in fact no attempt to draw

said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings. That said Clerk did in fact select from said box the names exclusively of adherents of the political parties adverse to that of the defendants and of persons likely to be and in fact hostile to and prejudiced against these defendants. That thereby defendants have been deprived of their constitutional right of due process of law and of trial by an impartial jury of their peers.

8. That all said jurors both inside and outside the City of Cleveland were summoned by mail; that the actual delivery of the summons in such cases was not by any officer of the Court or other qualified person, but by a person unknown, to-wit, a letter carrier.
17 That of the said grand jurors so summoned by mail and serving, seven were designated not by their christian names, but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to reside. Further, that of the fifteen (15) persons summoned by mail for the petit jury, nine (9) are designated not by their christian names but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to re-ide. That by reason of the neglect of all safeguards both as to the manner of serving the summons and the identity of the persons so summoned, defendants are deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

9. That there are nineteen (19) counties composing the Eastern Division of the Northern District of Ohio, but that the Clerk, without an order of the Court directing him to select any parts of said division, in drawing the names for said grand jury did not draw any names from seven of said counties, to-wit, Ashland, Ashtabula, Carroll, Holmes, Tuscarawas, and Trumbull, but drew six from Cuyahoga; and in the grand jury as accepted nine counties were without representative. That in the drawing of names for said petit jury the Clerk, without an order of Court, has drawn 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but has not drawn any names from 8 counties within said Division, to-wit, Crawford, Holmes, Lorain, Mahoning, Richland, Summit, Tuscarawas, and Trumbull. That this unequal distribution of jurors and failure to select names from large portions of the territory within the District and confining such drawings to only a part of said District,
18 is in violation of Sec. 277 of the Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

10. That both the grand and petit juries were special juries ordered for a special purpose; that by Sec. 281 of the Judicial Code the Marshal was required to return them in the same manner and form as is required in such cases by the laws of Ohio, but failed so to do.

MORRIS H. WOLF.
JOSEPH W. SHARTS.

STATE OF OHIO,
Cuyahoga County, ss:

Charles E. Ruthenberg, being duly sworn, says he is one of the defendants above named, and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed in my presence by the said Charles E. Ruthenberg this 24th day of July, A. D., 1917.

[SEAL.] MORRIS H. WOLF,
Notary Public.

19 *Answer to the Challenge to the Array of the Grand Jury and the Petit Jury.*

(Filed July 17, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

Answer to the Challenge to the Array of the Grand Jury and Petit Jury.

Now comes E. S. Wertz, United States Attorney for the Northern District of Ohio, counsel for the United States of America, and for answer in the above entitled cause of action denies each and every allegation of the defendants' challenge to the array of the grand jury and petit jury, and asks that the motion and relief asked for by the defendants herein in their Challenge to the Array of the Grand Jury and Petit Jury, be refused and denied.

E. S. WERTZ,
United States Attorney.

Sworn to before me and subscribed in my presence this 17th day of July, 1917.

[SEAL.] F. B. KAVANAGH,
Notary Public.

20 *Motion to Quash.*

(Filed July 18, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Motion to Quash.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, move the court to quash the indictment herein by reason of defects apparent upon the face of the record, in this, to-wit:

1. The grand jury which found said indictment was not drawn and impanelled as required by law.

2. Said grand jury was not legally constituted, and was not a lawful grand jury.

3. Said grand jury was not a jury of the State and District as required by law but of only the Eastern Division of said District and was drawn from only a portion of the Counties within said Division, and said selection of Counties was made by the Clerk without an order of the Court indicating from what parts of the District said jury was to be drawn.

4. Said grand jury had not been drawn by name from a jury box containing at the time of said drawing the names of 300 persons; nor had the jury commissioners who were then authorized by law, placed all of the names in said jury box but a large number had placed therein by one Jeremiah J. Sullivan, whose term of office expired prior to the order of the Court for such drawings.

5. Three of the members of said grand jury had not been selected nor their names put in said jury box by the jury commissioners having authority so to do at the time of the issuing of the

21 order by the court and the said drawing.

6. One D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without anyone of such name having been selected or summoned.

7. Said grand jury was not summoned nor returned by the Marshal in the manner and form required by law, in this, to-wit: He summoned all by mail instead of personal summons, including James W. Butler, Cleveland Heights, Ohio; Hugh Collins, Cleveland, Ohio; Julius Renker, Cleveland, O.; Adam J. Stiefel, Cleveland, O.; Fred Witt, Cleveland, O.; and said Marshal did not summon the entire venire of thirty (30) names as ordered by the Court and

drawn by the Clerk, but selected 19 of said names, as appears by the Record. Said petit jury was not summoned by the Marshal in the manner and form required by law, in this to-wit: He has summoned all of said jury by mail, including the following, purporting to be of Cleveland, Ohio: Guy Booth, William Fleming, W. G. Morris, Herman Schlee and A. H. Weise.

8. Said grand jury had no jurisdiction of the persons of these defendants, and no jurisdiction to inquire into said alleged offense or present an indictment against these defendants therefor.

9. Said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

10. Said indictment was not prepared nor presented by the grand jury in the manner required by law.

11. Endorsements not provided by law, and prejudicial to these defendants, have been placed upon the back of said indictment.

22 12. Said indictment fails to show that the events constituting the alleged offense occurred before the sitting of said grand jury, and before the finding of said indictment.

13. The indictment fails to show that the grand jurors were of the necessary qualifications, were of the body of the State and district, and sitting within the district.

14. Said indictment fails to state that said Alphons J. Schue was a citizen of the United States or a male person not an alien enemy, who has declared his intention to become a citizen, at the time said offense is alleged to have been committed.

15. Said indictment fails to state that said Proclamation had been published at the time said offense is alleged to have been committed by these defendants, or was ever published.

16. Said indictment fails to negative the possible appointments provided for in sub-division third of Sec. 1 of the Draft Act.

17. Said indictment alleges three separate offenses in one count.

18. Said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce, and procure said Schue to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

19. The indictment charges these defendants as accessories instead of principals.

20. Other reasons apparent upon an inspection of the record.

MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

23 *(Plea in Abatement, Presented by Defendants for Filing, Leave to File Being Refused by the Court.)*

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Plea in Abatement.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, say that the United States of America ought not further to prosecute the said indictment against them, because:

1. The names of all persons placed in the jury-box from which have been drawn the names of all the grand jurors and petit jurors herein, were selected and put therein by Jeremiah J. Sullivan, a former jury commissioner whose term expired before the juries herein were ordered drawn, by George S. May, the present jury commissioner, both of whom were and are prominent and active members of the Democratic Party, and B. C. Miller, Clerk of the Court, a member of the Republican Party; the said defendants are members and officers of the Socialist Party, which is a minor political party in said district and was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said Socialist members and officers and a part of the propaganda of said Socialist Party and of said officers and members to defeat the Republican and Democratic Parties at the polls and deprive the partisans of said parties, including said commissioners and said Clerk, of political office; that the

24 platform and principles of said Republican and Democratic Parties are opposed to the platform and principles of said Socialist Party, and said jury commissioners and Clerk were and are because of being partisans of said two first-named parties and holding office on partisan consideration and for other reasons, hostile to and prejudiced against these defendants.

2. All the names so selected and put in said jury box were names of adherents of said Republican and Democratic Parties, exclusively, and did not include the names of any adherents of the Socialist Party, to which defendants belong both as officers and members, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist Party. That all the persons so selected were and are, by reason of their adherence to said Republican and Democratic

Parties and for other reasons, hostile to and prejudiced against these defendants and their party, which propaganda constitutes the alleged offense of these defendants. That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries and from which all members of their own party are systematically excluded, will deprive them of their constitutional rights to equal protection of the law, to justice, to trial by an impartial jury of their peers, and to due process of law; will be contrary to sec. 276 Judicial Code, and the grant of equal rights under Act of May 31, 1870, c. 114, sec. 16.

3. That the names so selected and placed in said jury box were taken exclusively, or almost exclusively, from the names of land-owners, property owners, and capitalists, and employers; that
25 the names drawn and picked from said jury box for the grand and petit juries herein are names exclusively of land-owners, property-owners, capitalists, and employers. Defendants are all proletarians, that is to say landless and propertyless wage-workers, and their interests as such are adverse in many respects to those of said landlords, property-owners, capitalists, and employers; the political propaganda aforesaid constituting the alleged offense of these defendants advocates the rights of proletarians as opposed to those of landlords, property-owners, capitalists, and employers, and urges the abolishment of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and selected. Said jurors so drawn were and are by reason of their said private interests and sources of income hostile to and prejudiced against these defendants and said propaganda. There were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest, or Profit and would therefore not be rendered hostile to and prejudiced against these defendants on account of any private interests and sources of income, but said persons are purposely excluded from said jury service. To permit defendants to be tried and indicted by juries so drawn and selected will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 Judicial Code.

4. Said juries have been selected and drawn from only a part of the Northern District of Ohio, instead of from the entire District.

5. The Jury box from which were drawn the names for
26 said juries had not been emptied at any time within recent years, nor re-filled since November, 1916, many months before said drawings; many juries have been drawn since said last re-filling, and said box did not at the time of said drawings contain the names of qualified persons numbering 300, as required by law. Many of the names now in said box and at the time of said drawings were selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings. Of the persons sitting on said grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for the petit jury, three had been so selected and their names put in said box by said Sullivan; and the names of said six jurors had not been selected or put in the box by any person authorized so

to do at the time or after the order of Court for said drawings; contrary to Sec. 276 Judicial Code.

6. The jury box used for said drawings was small, rectangular, and incapable of being rotated so as to mingle the names; there was in fact no attempt to draw said names by lot, but the Clerk of the Court, said B. C. Miller, in the presence of the Marshal, one Charles W. Lapp, both of whom are political adversaries of these defendants and opposed and prejudiced against them, selected from said box such names as said Clerk preferred for these proceedings. Said clerk did in fact select from said box the names exclusively of adherents of the Republican and Democratic Parties and likely to be and in fact hostile to and prejudiced against these defendants; in violation of defendants' constitutional rights of due process of law and trial by an impartial jury of their peers.

7. Said Marshal, Charles W. Lapp, and his deputy, who
27 served the writs of venire for both of said juries were not "indifferent persons" as required by law, but active partisans and adherents of the Democratic Party and political adversaries of these defendants, said Marshal being an active member of the Democratic Club of Cleveland, and a former member and president of the City Council.

8. Said Marshal did not summon the thirty (30) men for grand jury service as ordered by the Court and drawn by the Clerk, but selected and summoned nineteen (19) of them.

9. All persons who were summoned for said grand jury and petit jury were summoned by mail, including a number who purported to be residents of Cleveland, Ohio.

10. Of the petit jurors drawn and summoned, Guy Booth is not now a resident of the City of Cleveland as the record purports to show; nor of any other place within said District to defendants' best knowledge and belief; that Herman Schlee is not now a resident of the City of Cleveland, at 3857 West 41st Street, as the Record purports.

11. One D. E. Grager was sworn as a grand juror, no such name having been drawn from the jury box, nor any one of that name summoned; and the address of one D. E. Graver, who was summoned by mail, purports to be East Clairdon, Ohio, there being no such Post Office address in Ohio.

12. All of the grand and petit jurors summoned from addresses outside of Cleveland, O., were addressed simply by Town or City without Street Number or Post Office box, and almost all were addressed by initials instead of their proper names, so that it is practically impossible to *in*identify them.

28 13. Nineteen counties compose the Eastern Division of the Northern District of Ohio, but the Clerk in drawing the 30 names for said grand jury drew six (6) from Cuyahoga County alone and none from seven (7) counties, to-wit: Ashland, Ashtabula, Carroll, Holmes, Median, Tuscarawas, and Trumbull and in the grand jury as sworn 9 counties are without representatives. In drawing said petit jury, said Clerk, without any order of Court directing such selection, drew 5 from Cuyahoga, 4 from Columbiana,

and 3 from Ashtabula, but none from 8 counties, in violation of Sec. 277 Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

14. Both said juries were special juries ordered for a special purpose, to-wit, the investigation and trial of cases of violation of the Draft Act; that by Sec. 281 of the Judicial Code the Marshal was required to make return of them in the same manner and form as is required in such cases by the Laws of Ohio; that by the laws of Ohio the return of the Marshal in such cases must show personal summons, not summons by mail; but that the Marshal failed so to do.

15. Said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case.

16. Said grand jurors were not of the necessary qualifications, were not of the body of the State and District, nor properly constituted a grand jury.

And these allegations the said defendants are ready to verify. wherefore they pray judgment, and that by the Court they
29 may be dismissed and discharged from the premises in the said indictment specified.

MORRIS H. WOLF.
JOSEPH W. SHARTS.
Attorneys for Defendants.

STATE OF OHIO,
Cuyahoga County, ss.

Charles E. Ruthenberg being duly sworn, says that he is one of the above named defendants and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed before me by the said Charles E. Ruthenberg this 17th day of July, A. D. 1917.

[SEAL.]

MORRIS H. WOLF,
Notary Public.

30 *Demurrer.*

(Filed July 18, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Demurrer.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, demur to the indictment herein for the reasons:

(1.) that the facts set forth therein do not constitute an offense against the laws of The United States;

(2) that the indictment charges these defendants with being accessories to a misdemeanor;

(3.) that it does not allege the events or acts as occurring prior to the finding of the indictment;

(4.) that it does not allege the indictment to have been presented by a grand jury "duly" empaneled and sworn, and in, of, and for the district;

(5.) that the said Act of May 18, 1917, entitled: "An Act to Authorize the president to increase temporarily the military establishment of The United States", and the "Proclamation" of same date, are unconstitutional on the following grounds:

(*a*) Said act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;

(*b*) Said Act deprives men of their liberty without due process of law, in violation of Amendment V of the United States Constitution;

31 (*c*) The Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;

(*d*) Said Act violates Article I Section 8 Clause 15 of the United States Constitution;

(*e*) Said Act violates Article I Section 8 Clause 16 of the United States Constitution;

(*f*) Said Act in Section IV thereof violates Article III Section I and Article I Section 8 Clause 9 of the United States Constitution;

(*g*) Said Act violates Article II Section 2 of the United States Constitution;

(*h*) Said Act violates Article X of the Amendments of the United States Constitution;

(*i*) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in Preamble to the United States Constitution.

JOSEPH W. SHARTS,
Attorneys for Defendants.

32 *Hearing on Challenge to Array Concluded and Overruled: Defendants' Motion to Quash Heard and Overruled; Leave to Defendants to File Plea in Abatement Refused by the Court: Defendants' Demurrer Heard and Overruled.*

(Entered July 18, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED E. WAGENKNECHT, and CHARLES BAKER.

This day came again the parties at the bar of Court whereupon hearing on the challenge of defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker to the array of Grand and Petit Jurors was resumed and arguments of counsel being concluded, the Court after due consideration overruled the said challenge, to which ruling and order of the Court the said defendants then and there excepted. Whereupon the said defendants Charles E. Ruthenberg, Alfred E. Wagenknecht and Charles Baker having filed their motion to quash the Indictment herein, said motion was duly heard and overruled by the Court, to which ruling the said defendants then and there excepted; thereupon said defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker moved the Court for leave to file a plea in abatement, which request was objected to by the United States Attorney, and refused by the Court, to which ruling and order the said defendants then and there excepted; and the said defendants having by leave of Court filed their demurrer to the Indictment herein, the said demurrer was duly heard by the Court and overruled, to which ruling the said defendants then and there excepted. Whereupon the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker moved the Court for a separate trial, which motion was duly overruled by the Court, to which ruling and order the said defendants having
33 excepted, they were each rearraigned, and each waiving the reading of the Indictment each for plea thereto say they are not guilty in manner and form as they are each by the Indictment therein and thereby charged, and the impanelment of the jury having begun but not concluded further proceedings were continued until tomorrow morning at 9 o'clock.

34 *Jurors Empaneled and Sworn.*

(Entered July 19, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, accompanied by counsel at the bar of Court, the selection of a Jury being resumed, there came as jurors, Albert H. Currie, John Spaller, Joseph Whitaker, Charles Wood, J. M. Brewer, A. H. Scoville, John H. Wysson, John T. Gulfoyle, R. S. Torbet, Edwin Thomas, R. B. Richards and W. G. Morris, whereupon said jurors being duly empaneled and sworn the trial of this cause commenced. And the said jury having heard all the testimony in chief on behalf of the United States, and the hour of adjournment having arrived, the further proceedings were continued until tomorrow morning at 9:30 o'clock.

35 *Trial in Progress.*

(Entered July 20, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker accompanied by counsel, and the jury heretofore empanelled and sworn at the bar of Court and the trial of this cause proceeded. And the said jury having heard all the testimony in chief adduced on behalf of the United States, whereupon said defendants moved the Court to arrest the testimony from the Jury and direct a verdict on behalf of the defendants, which motion was argued by counsel and overruled by the Court, to which ruling and order of the Court the defendants then and there excepted. Whereupon testimony on behalf of defendants was begun

and concluded, further proceedings were continued until tomorrow morning at 9:00 o'clock.

36 *Trial Concluded. Jury Charged. Verdict Guilty as to Defendants Ruthenberg, Wagenknecht, and Baker.*

(Entered July 21, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles Ruthenberg, Alfred Wagenknecht and Charles Baker, and the Jury heretofore empaneled and sworn, whereupon the trial of this cause proceeded. And the said Jury having heard all the testimony and arguments of counsel and charge of the Court retired to their room in charge of a sworn officer of this Court to deliberate upon their verdict. And now comes said jury into open Court with their verdict in writing, signed by their foreman which verdict reads and *in is* the words and figures following to wit:

"United States of America, Northern District of Ohio, ss April Term, A. D. 1917. The United States, Plaintiff, vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, Defendants. In the District Court of the United States, No. 3873.

Verdict.

We, the Jury in this case, being duly impanelled and sworn, do find the Defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker Guilty as they are each by the Indictment therein and thereby charged. Joseph Wittaker, Foreman."

which verdict was by the Clerk of this Court read in the hearing of said jury, when to which they gave their assent.

37 Whereupon the United States Attorney having moved the Court for sentence the counsel for said defendants gave notice in open Court of his intention to file a motion for a new trial and a motion for arrest of judgment, which motions were duly filed and it is now further ordered that further proceedings herein be continued to next Wednesday the 25th day of July, A. D. 1917, and that the recognizance heretofore entered into by said defendants for their appearance here in this Court to answer unto the Indictment herein remains in full force and effect until said 25th day of July, A. D. 1917.

38 *Motion for a New Trial.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

C. E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Motion for a New Trial.

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, by Morris H. Wolf and Joseph W. Sharts, their attorneys and each for himself and jointly move the Court to set aside the verdict rendered herein and to grant a new trial, and for reasons therefor, show to the Court the following:

(*a*) The Court erred in not requiring the prosecution to file exceptions for an answer or a demurrer to defendants' challenge to the grand and petit jury panels and array; and in refusing to allow defendants to present evidence to substantiate allegations as to the first, second, third, sixth and 7th grounds thereof; and in overruling said challenge.

(*b*) The Court erred in overruling defendants' motion to quash the indictment and each count thereof.

(*c*) The Court erred in overruling defendants' "plea in abatement" and refusing to permit same to be filed, and each count thereof.

(*d*) The Court erred in overruling defendants' demurrer to the indictment and each count thereof.

(*e*) The verdict is contrary to the law of the case.

(*f*) The verdict is not supported by the evidence in the case.

39 (*g*) The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

(*h*) The Court, upon the trial of the case, excluded competent evidence offered by the defendants.

(*i*) The Court erred in refusing to direct a verdict of "not guilty" for each and all of the defendants at the close *fo* the government's evidence.

(*j*) The Court erred in not directing a verdict of "not guilty" for each and all of the defendants at the close of all the evidence.

(*k*) Newly discovered evidence which defendants were unable to obtain and produce at the time of the trial, is shown by the affidavits filed herewith.

(*l*) The Court erred in allowing the jury to separate for the lunch hour and to leave the confines of the Court and go upon the streets, after the arguments in the case but before the charge, at a time when great public excitement and political passion reigned, and when it was practically impossible for a juror to be unaffected by the state of the public mind, said time being the day when the draft numbers were being published, and great enlistment activities were prevailing in the immediate vicinity of the Court House.

(*m*) The Court erred in permitting the attorneys for the prosecution to appeal to the political passions and prejudices of the jurors in their arguments.

(*n*) Because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

40 *Affidavit.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Affidavit.

STATE OF OHIO,
County of Cuyahoga, ss:

Before me, a Notary Public, in and for said County, personally appeared Tom Clifford, who being by me duly sworn, says that he is a resident of the City of Cleveland, and a member of the Socialist Party of the City of Cleveland.

Affiant further says that, while going through some files on the 23rd day of July, 1917, in the Socialist Hall on the corner of Sachett Avenue and West 31st Street, which is a hall of one of the branches of the Socialist Party of the City of Cleveland, he, accidentally, discovered, in one of the drawers in a desk at the said hall, an application for membership in the Socialist Party signed by Alphons Schue, which application card has a mark "6th" indicating that it had been presented to the branch on the 6th day of May, 1917, which card is hereby attached.

Affiant further says that he has no means of knowing and did not know, prior to the said finding of the card, that this card or any such card was had or was in any of the files in the said branch of the Socialist Party.

TOM CLIFFORD.

Sworn to before me and subscribed in my presence, by the said Tom Clifford, this 23rd day of July, 1917.

[SEAL.] MORRIS H. WOLF,
Notary Public.

41 Paid 25c. 6th.

Application for Membership in the Socialist Party.

6. "I, the undersigned, recognizing the class struggle between the capitalist class and the working class, and the necessity of the working class organizing itself into a political party for the purpose of obtaining collective ownership and democratic administration and operation of the collectively used and socially necessary means of production and distribution, hereby apply for membership in the Socialist Party. I have no relations (as member or supporter) with any other political party. I am opposed to all political organizations that support and perpetuate the present capitalist profit system, and I am opposed to any form of trading or fusing with any such organizations to prolong that system. In all my political actions while a member of the Socialist Party I agree to be guided by the constitution and platform of that party."

Name—Alphons Schue.

Occupation—Machinist.

If a member of a labor organization give name and number.

Street Address, 2208 Elvira St. Ward, 4. City, —. State, —. County, Cuyahoga. Proposed by Carl Perawa. Age, 22. Date, —— —, 191–. Citizen (yes or no), Yes.

(Endorsement:)

This applicant was elected a member of Branch —. Local —. Date —— —, 191–. —— ——, Sec'y. Street Address —.
42 Recorded by City Central Com. —— —, 191– or County Central Com. —— —, 191–. —— ——, Sec'y. Street Address —. Western Printing & Litho. Co., Racine, Wis.

43 *Motion in Arrest of Judgment.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Motion in Arrest of Judgment.

Now, after verdict against the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and before sentence, come the said defendants in their own proper persons and by Morris H. Wolf and Joseph W. Sharts, their attorneys, and each for himself and jointly move the Court herein to arrest judgment herein and not pronounce the same, for the following reasons, to-wit:

(*a*) The Court erred in not requiring the prosecution to file exceptions or an answer or a demurrer to defendants' challenge to the grand and petit jury panels and array; and in refusing to allow defendants to present evidence to substantiate allegations as to the first, second, third, sixth and seventh grounds thereof; and in overruling said challenge.

(*b*) The Court erred in overruling defendants' motion to quash the indictment and each count thereof.

(*c*) The Court erred in overruling defendants' "plea in abatement" and refusing to permit same to be filed, and each count thereof.

(*d*) The Court erred in overruling defendants' demurrer to the indictment and each count thereof.

(*e*) The verdict is contrary to the law of the case.

44 (*f*) The verdict is not supported by the evidence in the case.

(*g*) The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

(*h*) The Court, upon the trial of the case, excluded competent evidence offered by the defendants.

(*i*) The Court erred in refusing to direct a verdict of "not guilty" for each and all of the defendants at the close of the government's evidence.

(*j*) The Court erred in not directing a verdict of "not guilty" for each and all of the defendants at the close of all the evidence.

(*k*) Newly discovered evidence which defendants were unable to

obtain and produce at the time of the trial, is shown by the affidavits filed herewith.

(*l*) The Court erred in allowing the jury to separate for the lunch hour and to leave the confines of the Court and go upon the streets, after the arguments in the case but before the charge, at a time when great public excitement and political passions reigned, and when it was practically impossible for a juror to be unaffected by the state of the public mind, said time being the day when the draft numbers were being published, and great enlistment activities were prevailing in the immediate vicinity of the Court House.

(*m*) The Court erred in permitting the attorneys for the prosecution to appeal to the political passions and prejudices of the jurors in their arguments.

(*n*) The Court erred in overruling the motion for a new trial.

Because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

45 *Motions for New Trial and for Arrest of Judgment Overruled: Order of Sentence and Order to Enter into Recognizances.*

(Entered July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came the United States Attorney on behalf of the United States and also came the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker accompanied by counsel at the bar of Court, and thereupon came on to be heard the motion of said defendants for a new trial, and motion for arrest of judgment which motions after due consideration were each separately overruled by the Court, to which rulings and orders of the Court the said defendants then and there excepted, and the Court now coming to the imposition of sentence each defendant being inquired of whether he had anything to say before sentence was pronounced and the Court receiving the replies of each of the defendants it is ordered that the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, be each confined in the Stark County Workhouse at Canton, Ohio, for a period of One (1) Year, from and after the 28th day of July A. D. 1917, to which sentence and order of the Court each of said defendants then and there excepted and gave notice in open Court of their intention to appeal

this cause and filed their petition for a Writ of Error to The Supreme Court of the United States which petition was duly allowed by the Court and said defendants were allowed fifty (50) days within which to prepare and file their Bill of Exceptions, and leave is also granted said defendants to file an Amended Assignment of Errors by the 1st day of August, A. D. 1917.

46 Whereupon on motion of counsel for said defendants, it is ordered that each of said defendants, enter into a recognizance in the sum of Five Thousand ($5,000.00) Dollars, with sureties to be approved by the Clerk of this Court for their appearance from day to day thereafter pending a hearing upon a Writ of Error to the Supreme Court of the United States and shall surrender themselves to the United States Marshal, and that they shall then and there be present to abide the order and judgment of this Court or the said The Supreme Court of the United States and not depart the Court without leave thereof. Whereupon came the defendant Charles E. Ruthenberg as principal, and Abraham Kerman and Wm. Ruthenberg, as sureties and entered into the required recognizance and also came the defendant Alfred Wagenknecht as principal and Marguerite Prevey and Ernest Bodecker as sureties and entered into the required recognizance and also came the defendant Charles Baker as principal, and A. E. Herig and Otto Greenberg as sureties and entered into the required recognizance.

47 (*Order Approving Narrative Form of Testimony.*)

(Entered August 21, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day the bill of exceptions in this case was presented to the court, the same having been delivered to the clerk by the excepting party in accordance with Rule 38 of the General Rules of this court, and the adverse counsel having been notified of such delivery and no objections thereto having been filed, the same is allowed and signed, and ordered to be filed in this case.

48 *Bill of Exceptions.*

(Filed August 21, 1917.)

In the District Court of the United States, Northern District of Ohio, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Bill of Exceptions.

Be it remembered that, on the trial of the above entitled case, in the District Court of the United States for the Northern District of Ohio, Eastern Division, at the April, 1917, term thereof, before Hon. D. C. Westenhaver, Judge of said court, and a jury duly empaneled and sworn, the following proceedings were had:

Appearances.

For the Government, Mr. E. S. Wertz, District Attorney, and Mr. Francis B. Kavanagh, and Mr. Joseph L. Breitenstein, Assistant United States Attorneys.

For the Defendants: Mr. Joseph W. Sharts and Mr. Morris H. Wolf.

49 July 16, 1917—3:00 p. m.

The counsel for defendants presented to the Court a challenge to the array of the Grand Jury and petit jury.

Mr. Wertz: I presume, if the Court please, it will be necessary, inasmuch as that motion is in the form of an affidavit, to offer some testimony.

The Court: My understanding of a challenge is that it is a matter to be tried by the Court and will, of course, be tried upon such evidence as is presented. Naturally, the person filing the motion or challenge would bring forward such evidence, if any, as they saw fit to bring to the attention of the Court in addition to the affidavit itself, and then the Government will bring forward its testimony. That, I understand, is the practice, Mr. Sharts.

Mr. Sharts: If your Honor please, there has been nothing filed by the District Attorney's office, either in the way of a demurrer or as an exception or an answer, and for that reason we have been unable to understand that an issue had been made up.

The Court: No issues are required. No answer is required. No exception is required. They may object to the sufficiency of the

affidavit, if they wish to submit it in that way, instead of to present such evidence as they may see fit to present.

Mr. Sharts: If your Honor will permit me, I will take an exception. Enter an exception to the ruling of the Court.

The Court: An exception to what?

Mr. Sharts: An exception to the ruling of the Court that neither an answer or exceptions or a demurrer are required before testimony.

50 Thereupon the defendants, to maintain the issues upon their part, on the challenge to the array, called as a witness in their behalf B. C. MILLER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is B. C. Miller. I am Clerk of the United States District Court of the Northern District of Ohio and have occupied that position since February 1, 1912. During my term of office the Jury Commissioners who have acted in conjunction with me are Jeremiah J. Sullivan, of Cleveland, and George S. May, of Napoleon, Henry County, Ohio. On August 4th, 1916 the resignation of Jeremiah J. Sullivan as Jury Commissioner for the Northern District of Ohio was accepted and George S. May was appointed as Jury Commissioner in his stead. I understand that Mr. Sullivan now resides in Cleveland, Ohio. Mr. May resides in the Western Division of this Court. Mr. May has performed the duties of Jury Commissioner for the Eastern Division since the time of his appointment on August 1, 1916, which was exactly contemporaneous with the resignation of Mr. Sullivan.

I think the last time Mr. Sullivan placed names in the jury box was May 19, 1915. At that time he placed 205 names in the box and I placed 205 names in the box. Since that time, 400 were placed in the box on the 15th of November, 1916, 200 by Mr. May, the Jury Commissioner, and 200 by myself. Since that time neither Mr. May nor myself has placed any names in the box. Since
51 November, 1916, there has been 273 names drawn from the box. From the time the last names were placed in the box by Mr. Sullivan and myself down to the time of its refilling by Mr. May and myself 392 names were drawn from the box, making a total amount of names drawn from the box since Mr. Sullivan's last placing of names therein of 665. At the time Mr. Sullivan last placed names in the box there were 324 names therein.

Q. Now, what were the political principles of Mr. Sullivan?

Mr. Wertz: I object.

The Court: I think that I will sustain the objection to that question, but permit you to put the inquiry in the language of the Statute, as to whether or not he was a member of the dominant political party of politics opposite to that of the Clerk. I think that is the

extent of the legitimate inquiry. I do not believe it is permissible to prove whether he was prohibitionist or republican of democrat, or of any other political faith beyond that it was a faith opposite to that of the Clerk.

Mr. Sharts: Enter an exception to the ruling of the Court.

Q. State, Mr. Miller, if Mr. Sullivan was a member of a political party other than your own at the time that he was Jury Commissioner?

A. He was.

Q. State whether that political party was a principal political party in the District?

A. It was.

52 Q. Can you give the names of the principal political parties in the District?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Exception.

Q. What is your political affiliation?

Mr. Wertz: I object.

The Court: Objection will be sustained.

Mr. Sharts: Enter an exception.

Q. State whether or not Mr. Sullivan was a well known member of a political party opposed to your own?

A. He was.

Q. Can you state how well known?

The Court: Do you think that that is susceptible of an answer, Mr. Sharts?

Mr. Sharts: I would suppose we were entitled to some concrete information on the subject.

The Court: No. I will of my own motion sustain an objection to that.

(Exception by defendants.)

Q. Will you state, Mr. Miller, what were the political affiliations of Mr. May?

Mr. Wertz: I object.

The Court: The objection will be sustained, unless you make your question in the form I indicated a moment ago.

Mr. Sharts: Exception.

Q. State whether or not Mr. May was a member of the principal political party in the District opposing that to which you yourself belonged?

53 A. He is.

Q. State whether or not he was a member of the same political party with Mr. Sullivan?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception, for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic party and that Mr. Miller is a member of the Republican party, and that the Socialist party is without representation on the jury board. This is the ground of exception in the previous questions. I did not know the political affiliations of the men whose names Mr. Sullivan was putting in. I did not know whether or not Mr. May, in his selection of names, was guided by any party affiliations, except that I called his attention to the statute at the time he was appointed, particularly that feature of it. In selecting names myself, I did not allow myself to be guided by the party affiliations of any of the persons that I selected. I do not know that there are any names of socialists in the jury box placed there by myself. I do not know that there are any names of republicans or democrats placed there. As to the names placed in the box by either Mr. Sullivan or Mr. May, I do not know whether they are republicans or democrats.

Q. Do you know whether or not the names of any that are in the box are the names of republicans or the names of democrats?

Mr. Wertz: I object.

54 The Court: I will sustain the objection to that question.

Mr. Sharts: Enter the exception for the same reasons as above.

Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used?

Mr. Wertz: I object.

The Court: I do not think that is a material line of inquiry, Mr. Sharts.

Mr. Sharts: Enter an exception, because we expect to show by this witness that he has made use of the files of the Board of Elections and has drawn therefrom names of partisans of the republican and democratic parties and excluded the names of adherents of the socialist party.

The Court: In view of that tender of proof, I will reverse the ruling and permit the question to be answered.

A. I obtained the names by writing to the Common Pleas Judges of this Division for various Counties, and asking them to send me a list of men in their counties qualified to serve as jurors.

Q. Were the Common Pleas Judges to whom you sent this request members of any political party?

Mr. Wertz: I object.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception, because we expect to show that the Common Pleas judges to whom this witness applied for names were all of them members of the republican and democratic

55 parties and not of the socialist party.

Other names that I used were those of men that I knew personally, a very few, which I selected and put in, and occasionally some name will be suggested to me by some one and I place that name in a drawer and some of those I select and some of them I reject when I come to make up my list.

Q. Do you know in what manner the list of names that were sent to you from the Common Pleas judges, as you have described, had been selected?

A. Not in detail.

Mr. Wertz: I object to the question. It would be hearsay.
The Court: I sustain the objection to that question.
Mr. Sharts: Enter an exception.

Q. Did you, in asking the Common Pleas judges for these lists of names, indicate in any way how they were to be selected or exclude any particular method of selection?

A. I think not, except that they should be "qualified."

Q. What did you mean by the word "qualified"?

A. Whatever the Statute meant by it.

Q. State, if you know, in what way Mr. Sullivan secured his names for the jury wheel, or from what source?

A. I do not know positively.

Q. State, if you know, in what way Mr. May secured his names for the jury box?

A. I do not know that.

53 Q. State if you are personally aware, or if you have by investigation become aware of the property qualifications, of the standing in the financial and commercial world, of any of the men whose names have been placed in the jury box by you?

Mr. Wertz: I object.
The Court: The objection to that will be sustained. I do not understand that the law under which we are operating disqualifies any man from being placed in the jury box or to serve on the jury because he has or has not property, and, therefore, the question is immaterial.
Mr. Sharts: Enter an exception on the ground that by this question defendants expect to establish the allegations of the third ground of challenge to the jury array.

Q. State whether or not the names placed in the jury box are the names of land owners, property owners, and capitalists?

Mr. Wertz: Objection.
The Court: The same ruling on that.
Mr. Sharts: Enter an exception on the same ground.

These jurors whose names have been selected are from the Eastern Division and every county in the Eastern Division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out and I cannot tell whether all of the names from one country have been drawn out that have been

put in and the list of names from that county has been exhausted, or whether still some of them are there.

57 I keep a card index record in my office of the list of names of those who are put in the jury box. It is a public record. I think in every instance on that card index I have indicated the Commissioner or myself who placed the name in the jury box. Before the last drawing of jurors for these panels, I think that there were some names in the jury box, as indicated by my card index, which were placed there by Mr. Sullivan. As to whether or not there are any now, I cannot say positively.

Q. I will ask you to go through your card index, if you can, and give us a rough estimate of the proportion of names that are now in the jury box that were placed there by Mr. Sullivan?

A. I can do so.

The Court: I will sustain an objection to that part of it. I think when I have permitted you to establish that there were names there, I have given you the benefit of all that you are entitled to.

Mr. Sharts: Just enter an exception, on the ground that we expect to show by the proportion of names that a considerable number of the names in the jury box now and at the time of the drawing and the order of the Court were names placed there by Mr. Sullivan and that such names are disqualified and that the remaining names would not constitute the required 300.

Mr. Wertz: You mean those names were placed there by Mr.

58 Sullivan at the time as Jury Commissioner, Mr. Sharts?

Mr. Sharts: Yes.

At the time of the drawing of the Grand Jury which brought in the indictment in this case, there were four Grand Jurors drawn whose names were placed in the box by Mr. Sullivan. At the time of the drawing of the Petit Jury for this term which is to try this case, there were three of the twenty placed in the box by Mr. Sullivan.

Q. State whether or not the names of the Grand Jurors are representative of all the counties within the Eastern Division of the Northern District of Ohio?

The Court: Are representative?

Mr. Sharts: I mean whether those names are drawn as residents of all of the counties of the Eastern Division.

Mr. Wertz: You mean "drawn"?

Mr. Sharts: Drawn.

Mr. Wertz: I object.

The Court: I will sustain the objection to that. I have a clear conviction that it is not necessary in drawing a Grand Jury that there should be brought out from the box someone from every county in the District. The Clerk could not do that honestly. It would be necessary for him to select the jurymen in order to produce a result of that sort, so that I will sustain the objection.

Mr. Sharts: Enter an exception on the ground that we expect to

show by this answer that there was drawn from the jury box
59 a set of names selected by the Clerk from some of the counties in the District and Division and not from the others, and that there was no order by the Court directing him to make such a selection.

The Court: Now, Mr. Sharts, you are making an offer of proof there that the Court probably does not understand and perhaps you did not intend to put it in that way. Do I understand that you are making an offer of proof to show that the Clerk in drawing those names undertook to select names rather than to draw names?

Mr. Sharts: If Your Honor please, we have stated in our seventh objection or challenge that the jury box used for said drawing was small and rectangular, and incapable of being rotated so as to shake together and mingle the names, that there was in fact no attempt to draw said names by lot, that both the Clerk of Court in the presence of the Marshal, both of whom were political adversaries of the defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings.

The Court: I want merely to say, Mr. Sharts, that your offer of proof there is an offer of proof entirely outside of any question which the Court ruled upon and is not warranted either by the question or the ruling of the Court.

Mr. Wertz: Perhaps I had better withdraw the objection and let him answer it.

The Court: No, we will take care of it.

60 Q. I will ask the question, then, in this form, or, rather, I will draw the information that I desire in this form: State the character of the jury box that is used for these drawings? About what size and shape is it?

A. It is a box, I would estimate, about ten inches long, maybe twelve inches, about six inches deep and perhaps six inches wide.

As to whether I have rotated the jury box, I have turned it over and from side to side, shaken it up and turned it around, upside down, on the side, the other side, and end to end.

The form in which the names are placed in the box is on small slips of cardboard, probably three inches long and an inch and a half wide.

In the drawing of the grand jury in this case I did rotate the box, in the presence of the Marshal and any one that happened to be in my main office at the time of the drawing. I did not particularly notice anyone there at the time.

I rotated the box when the names were drawn for petit jury service in this term, in that I shook it and turned it over.

The way this jury box is opened for the purpose of drawing the names out is, it is unlocked and the lid is raised on hinges. Then there is an inside cover under this lid with a hole just about large enough for my hand to get in, a circular hole in this inside cover, about three and a half or four inches in diameter. When I drew these names I put my hand in that hole and drew out the names one at a time. The only selection I made was that I felt for a

61 card, and when I felt that I had one card I pulled it out. To my recollection I did not put any names back in the box. My recollection is that I drew 30 names for grand jury service for the special term that brought in the indictment in this case. I drew 20 names for petit jury service on the last drawing.

62 The marshal of this court is Charles W. Lapp.

Q. And of what political affiliation?

The Court: I will sustain an objection to that.

Mr. Sharts: Enter an exception on the ground that by the sixth challenge we have charged that the marshal and his deputy who served the writs of venire for both of said juries were not "indifferent persons" but active adherents of the democratic party and political adversaries of the defendants, said marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council, and we expect to show by this line of questions that he was a political adversary of these defendants at the time he served the writs of venire.

I have the return of the marshal on the venire of the grand jury. It reads as follows:

"THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, Ohio, June 16, 1917, and on the same day, a copy was mailed to each of the following, who personally acknowledged summons in writing:

1. A. H. Babcock, Lorain, O.
2. E. K. Bebb, Wayland, Ohio.
3. Henry Brunner, West Park, O.
4. James W. Butler, Cleveland Heights, O.
5. Hugh Collins, Cleveland, O.
6. George F. Copeland, Millport, O.
7. Charles Dreiblebi, West Salem, O.
8. D. F. Graver, East Claridon, O.
9. Charles H. Krauter, Youngstown, O.

63 10. John E. Main, Perry, O.

11. James Miera, Everett, O.
12. W. W. McIntosh, Akron, O.
13. Julius Renker, Cleveland, O.
14. C. K. Russell, Painesville, O.
15. Adam J. Stiefel, Cleveland, O.
16. Emmet F. Taggart, Akron, O.
17. W. H. Thompson, Burbank, O.
18. J. B. Trall, Madison, O.
19. Fred Witt, Cleveland, O.

The following named were excused by order of the Court:

1. J. H. Petry, Galion, O.
2. Harry J. Griffin, Copley, O.
3. E. P. Johnson, Middlefield, O."

Then there is one name that has a pencil mark over it—

"4. Charles A. Miner, Cleveland, O.
5. J. H. Petry, Galion, O.
6. S. W. Warner, Wellington, O.
7. Reed Wilcoxsen, Lisbon, O.
8. S. P. Wiseman, Canton, O.

The following named could not be found in my district:

1. Philip Kennedy, Cleveland, O.
2. Rudolph Liebner, Cleveland, O.
3. P. E. Wigton, Lucas, Ohio.

(Signed) CHAS. W. LAY,
U. S. Marshal.
By E. E. LAY, *Deputy.*"

I have not as yet the return of the marshal on the petit jury. The venire for the petit jury is customarily issued and delivered to the marshal.

At the time I made the drawing of the names of this venire, I had no order of court directing me to select any certain counties,
64 other than those in the Eastern Division. There is a rule or order to that effect. There is an order or rule of court, rule 30, providing that the drawing shall be done by the Clerk in the presence of the marshal.

Q. I will ask you, in the drawing of the names for the grand jury, how many counties within the Division are not represented by any person residing therein?

Mr. Wertz: I object.

The Court: I will sustain the objection to that because I have a well-defined conviction that the fact that some counties were not represented in the drawing is not a valid objection.

Mr. Sharts: I would just like to call your Honor's attention to the fact that the Judicial Code does not provide for drawing by lot: that is not the manner indicated by the Code. Enter an exception on the ground that defendants expect to show by the answer that there were seven counties not represented by any names in that drawing.

Q. I will repeat the same question with regard to the petit jury, for the purpose of the record. How many counties were unrepresented in the drawing for the petit jury?

Mr. Wertz: I object.

The Court: I sustain the objection.

Mr. Sharts: Exception on the same grounds as before—that we expect to show by the answer of the Clerk that there were eight counties from which no names had been drawn within the Division.

Q. I will ask the Clerk to state how many names were drawn from Cuyahoga County.

65 Mr. Wertz: I object.

The Court: I will sustain the objection.

Mr. Sharts: Enter an exception on the ground that we expect to show that there were five drawn from Cuyahoga County.

Q. How many were drawn from Columbiana County?

Mr. Wertz: I object.

The Court: I sustain the objection.

Mr. Sharts: Exception on the ground that we expect to show there were four drawn from Columbiana County.

Q. How many were drawn from Ashtabula County?

Mr. Wertz: I object.

The Court: The same ruling.

Mr. Sharts: Enter an exception on the ground that we expect to show there were three drawn from Ashtabula County.

Cross-examination.

By Mr. Wertz:

At the time the grand jury was drawn which returned the indictments among which was the indictment against the defendants, there were 519 names in the jury box. At the time the petit jury was drawn which is now sitting in this court, at the last drawing, there were 489 names in the jury box. After the petit jury was drawn which is in this court at this time there were 469 names remaining in the jury box. At the time these names were placed in the box and at the different times to which I have testified, the names
66 placed therein by me were from all counties in the District. I did not check up the names of the other commissioners as to that, and do not know anything about that.

The drawing of both the grand and petit juries under consideration here was public. The present jury box has been in use in the District Court, to my personal knowledge, since the organization of the court as it is now, January 1, 1912. As Clerk of the District Court, going into office January 1, 1912, I received it as a part of the property of the Government from my predecessor.

Redirect examination.

By Mr. Sharts:

I cannot state what number of names of the 519 names in the jury box at the time of the drawing of the grand jury were placed in the box by Mr. Sullivan. I cannot state what number of the 489 names in the jury box at the time the petit jury was drawn were placed in it by Mr. Sullivan.

There was no public notice of the drawing. I do not re-call that there was any particular notice except the order of court. The order of court is dated June 15, 1917, and, to my personal knowledge, was signed by the court about half past four on the evening of the 15th

for the drawing of the grand jury, and the jury was drawn on the morning of the 16th. The order to draw the petit jury was signed July 2, 1917, and the jury was drawn on the 3rd of July. I have no personal recollection as to whether it was drawn in the morning.

67 There was nothing in the order of the court in either instance which directed at what time the jury was to be drawn. I notified the marshal of the orders of the court and as soon as he came in the drawing was made. In the one instance in which I spoke of it as being made the next day, I went to the marshal's office and he had gone home for the day. I notified him of the drawing that he was to attend for that purpose.

The last time I recall that there was an emptying out of the jury box and the replenishing of the names was on February 4, 1912, when there was an order entered by Judge Day directing that the names then in the jury box be withdrawn and that the Clerk and the Jury Commissioners deposit in said box, as provided by law, 400 names of residents of said Division for jury service. There has been none other since.

Mr. Sharts: Now, if your Honor please, I would like to call your attention, before I dismiss this witness, to the fact that we have here the Clerk of the Board of Elections with a card index and we expect to place him on the stand and we want to establish by a comparison between the card index of the Clerk and the card index of the Clerk of Elections that all of the names that went into the jury box at the time of these drawings were the names of republicans and democrats and not of socialists, and I wish, before this witness goes, to make a request for him to produce the card index for that purpose.

68 The Court: I will not require the witness to produce the card index for that purpose, and I will not receive testimony of the Clerk of the Board of Elections for that purpose.

Mr. Sharts: Enter an exception to the ruling of the court on the ground that we expect to show by the introduction of this testimony that the grounds of our second challenge are true.

The Court: No. What you proposed to show, Mr. Sharts, was that a comparison of the card index kept by Mr. Miller of the names in the jury box with the records of the Board of Elections—I suppose that is for Cuyahoga County, but for any county—would show the names in the card index were democrats or republicans.

Mr. Sharts: The point was simply this: We ourselves have not the list of names. It is possible we might have gone and copied all those names off his card index, but we did not do that. In order to put those names to the Board of Elections, first it will be necessary for us to have the card index to do it with, and I simply asked——

The Court: I am prepared to rule on the assumption that you asked the Clerk to produce the card index showing the list of names in the jury box, and that you proposed to show those names to the Clerk of the Board of Elections, and that you proposed to have the Clerk of the Board of Elections check them and say that the names of those on his card index are democrats and republicans. Now, you may have an offer of proof in that form and I will sustain the ob-

jection to it, but where I checked you was that you were
69 proposing to show by the witness that the allegations and statements of a certain specification were true. You stated in your specification a whole lot more than you offered to prove. I do not think you intended to put it in that way but that is the impression you made in my mind.

Mr. Sharts: Does your Honor make it a part of the record, your ruling, so that it will not be necessary——

The Court: Yes, I so rule that you may have an offer to prove that and an exception.

Mr. Wertz: Not as to the entire specification?

The Court: That he asked the Clerk to produce these records, his card index of the names in the box, and that he offered the Clerk of the Board of Elections as a witness to compare those names with the names of the Clerk of the Board of Elections, for the purpose of showing that the names of the Clerk's card index were the names of republicans and democrats, as shown by the records of the Board of Elections. That is, as I understand it, your offer of proof?

Mr. Sharts: Yes.

Mr. Wertz: So far as it applies to Cuyahoga County only.

Mr. Sharts: Will your Honor allow the same record with regard to the other counties?

Mr. Wertz: I object.

The Court: Upon that point, of course, you are not in a
70 situation to do that. I fancy you will find, when you go to a lot of the other counties, that there is no such record or classification, but the point is if you are right in your position and I am wrong in my ruling, it will not make you any "righter" or me any "wronger" if you should cover some other counties. I intend to give you the point you are making on the record fully and fairly for what it is worth. You may entertain a different view from the District Attorney as to what it is worth, and I am desirous you should have it put fairly.

Mr. Sharts: Enter our exception to the Court's ruling. For the purpose of a formal record, we wish to place the Clerk of the Board of Elections on the stand.

The Court: All right.

71 Thereupon the defendants, further to maintain the issues on their part, called as a witness, STEPHEN MCNEIL who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Stephen McNeil. I am Deputy Clerk of the Board of Elections in Cuyahoga County. I was subpœnaed to bring with me certain documents and have brought with me a record of all the electors of Cuyahoga County. This record does not contain their political affiliations. We have such a record for each of the 568 precincts.

By the Court: The records I have shows the political affiliations of the electors of Cuyahoga County who voted and registered at party primaries only.

Q. I will ask you to produce the records of the political affiliations of Cuyahoga County—if your Honor will just permit that in that form——

The Court: Does that obtain throughout the entire county?

The Witness: It obtains practically throughout Cuyahoga County.

The Court: They register for State primaries, do they not?

The Witness: No, they do not register. The register center is at Cleveland, or Cleveland, West Park, Rocky River, and Bedford.

The Court: They do not register for state primaries?

The Witness: No, sir.

72 Mr. Wertz: The record is not even complete. He has only those democrats and those republicans who went to the primary to vote.

The Court: I understand that. Mr. Sharts, he has told us now what kind of a record he has. Your request is that I order him to produce them?

Mr. Sharts: Yes.

The Court: If the record were produced by him and the evidence would go to the extent you have announced it and were material, I would so order it, but I refuse to require him to do so on the ground that the record is not material and would not be received. You have your exception.

Mr. Sharts: Enter the exception of the defendants on the ground that we expect to show by this witness and his records that all of the grand and petit jurors who were drawn for jury service in connection with the indictment and the trial in this case and all of the residents of Cuyahoga County whose names were in the jury box at the time of the drawings were and are adherents of the republican and democratic parties exclusively.

Mr. Wertz: I would like to show it is not a complete record but merely a record of such republicans and democrats who voted at the primaries voluntarily, that it is only partial.

The Court: Everybody votes voluntarily.

Mr. Wertz: It is not a list of the electors who are republicans and democrats and he attempts to broaden out his exception to apply to all of the men in the jury box.

73 The Court: If you claim anything for that, I will let you examine him just enough to show the incompetency of the testimony.

Mr. Sharts: Let me point out that, even if this is not a complete list of all the electors in the county, we undertook to show—I think we are very reasonable in assuming that we can—that all whose names are in the list of jurors are there.

Mr. Wertz: That is an awful broad assumption.

The Court: I think that is a very violent inference. I fancy that you will find that not to be true, but I am not going to permit the

time of the court to be taken up with the inquiry over a matter of so little materiality.

Cross-examination.

By Mr. Wertz:

The record that I have brought here or that I have is of the names and addresses of every registered voter, that is, where they have registration centers in Cuyahoga County. That registration does not show their politics. We have a separate registration of those who voted at party primaries. That shows the political affiliation claimed by the elector on the day he registers to vote at that primary. That includes all of Cuyahoga County, and contains the list of all the electors of the political party who voted and participated in the primaries.

The Court: The Court will take judicial notice of the fact that it includes only those who voluntarily registered to participate in the party primaries.

74 Thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf CHARLES W. LAPP, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Charles W. Lapp. My occupation is United States Marshal. I have held that position four years next Sunday. There are five deputies connected with my office for the Eastern Division. The deputy who has charge of the issuing of summons or serving summons in jury matters would be the person that would write the summons, the stenographer of the office. In this case it was Miss Elsie E. Lay. She is a deputy. I was marshal on June 15 and 16 and July 2nd and 3rd of this year. She was a deputy at that time.

Q. What are your political affiliations?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception on the ground that we expect to show that the marshal is as alleged in the sixth ground of challenge, an active adversary of the defendants, also an active member of the Democratic Club of Cleveland and a former member and president of the City Council.

The grand jurors for the April term were summoned as follows: Those outside of the city were summoned by mail in registered letters, for which we get returns from the Postal Department, and those inside of the city were summoned by deputies by hand.

75 Those served by hand were served by one of the deputies, Gauchat, Kelley, Walsh or Boehme. The paper you hand me

is the command to summons a grand jury and has my return upon it. The typewritten return is not correct where it states that summons were mailed to Julius Renker and Adam Stiefel. Those people were summoned by hand. I know that because I have my journal here. Those names were written on there by the deputy before the signature. I did not see the deputies make the service, but I see the papers handed to them and I see them come back with their returns on them. There is not on this paper any return for service by hand on Renker and Stiefel. There is on the official record of my office. No return has been turned in at the Clerk's office as to the service of summons by hand, on this paper.

There has been no return made upon the last twenty names drawn for the petit jury. I have our complete record of how the services were made. There is the return from the Postal Department.

A. C. Beals, Burton, Ohio. Served by mail by registered letter, for which I have the receipt.

Guy Booth, 10605 Kimberly Avenue, Cleveland, Ohio. Service attempted, not found in the district.

R. N. Chamberlain, East Palestine, Ohio. By registered mail. (Indicating on card.)

H. H. Cogsil, Kilgore, Ohio. There is his signature. O. B. Dealing, Medina, Ohio. (Indicating on card.)

Max H. Eaton, East Palestine, Ohio. Signature of Max
76 H. Eaton on a registry return receipt. (Indicating on card.)

William Fleming, not found. That is one of the three which we have here in which no return has been made.

In all cases where registered mail is sent to any one, if the person cannot be found the receipt, together with the letter, is returned to the sender always, so that we have the original summons back in case we mail a letter to a man that is registered and the registry card is not returned with his signature. We then make a return in court of "The within named so and so not found within my District."

In this particular instance it is a man inside of the city. Mr. Fleming is a man that lives in Cleveland and he was not found by the deputy when he went to the address given and inquired for him.

B. J. Holden. Mr. Holden's receipt on a return card. (Indicating on card.)

Mr. Carl Kimball is the next. Signature on receipt card. (Indicating on card.)

D. W. Mellinger. There is the signature on the receipt card. (Indicating on card. Receipted for by Mrs. D. W. Mellinger; receipted for by his wife.

Allan Mills is the next one. Receipted for by Laura Mills. (Indicating on card.)

W. G. Morris is the next one. That is Cleveland. Served by hand.

E. R. Peebles, Ashtabula. Return card signed "E. R.
77 Peebles". (Indicating on card.)

Richards of Kent is the next. Return card signed "R. B. Richards". (Indicating on card.)

Schlaffley of Mt. Eaton. Return card signed "J. J. Schlaffley". (Indicating on card.)

Herman Schles, West 41st Street. Not found. One of the three indicated.

Edwin Thomas, of Winona, Ohio. Return card signed "Edwin Thomas". (Indicating on card.)

Kent M. Wells, Ashland, Ohio. Return card signed "Kent M. Wells". (Indicating on card.)

A. H. Weise, Holyoke Avenue, East Cleveland. Card signed by Anna Weise. (Indicating on card.)

Frank Wise. Card signed "Frank D. Wise, by Harry D. Wise." (Indicating on card.)

That is the entire number.

Beals card was signed by himself, so far as I know. Eaton's card was signed by H. E. Orth.

Allan Mills is supposed to reside in Burton, Geauga County, Ohio. The postal mark on the registration card is Chagrin Falls. Burton, Rural Free Delivery, Geauga County, Ohio, is the correct address.

The address given for A. H. Weise is Holyoke Avenue, East Cleveland. East Cleveland is not a portion of the city of Cleveland. It has upon it the stamp of the post office of Cleveland, Collinwood station.

R. N. Chamberlain's card is signed by R. S. Chamberlain.

There were no summons sent to anyone inside of the city of Cleveland by mail. There never has been since I have been in office.

78 I was present at the time of the drawing of the grand jury that presented the indictment in this case. The drawing took place in the Clerk's office. Mr. Miller was present. Mr. Miller's clerks were present, to my knowledge, and there were attorneys and other people around the counter. I cannot recall anyone else that was there as a witness.

As to the manner in which the names were drawn from the box, as I recall it, I went into Mr. Miller's office, and told him that I was there to be present at the drawing of the jury. He went into his room, got his keys to unlock the jury box and brought the jury box out, set it on the counter, unlocked it, threw back the outside cover, reached his hand into the little hole in the center of the inside cover and drew the names out one by one and I laid them on the counter in rows of ten so that we would know when we got the required number. That was all he did, so far as I know. Several times in reaching down he shook the box or mixed them up, but I do not remember just exactly what. I am positive he took out just twenty names at the last drawing. At the grand jury drawing he took out thirty names, if my memory serves me right. When I was there he drew out the cards, they were laid in rows of ten on the counter, the names and addresses printed on each card. I think in that particular instance I selected them as near as I could afterwards in a package alphabetically and handed them to the stenographer to make a list of, to be signed by the Court and by the marshal. I remember the petit jury drawing. I

could not say exactly what time of day the grand jury
79 drawing was made. At the petit jury drawing identically the same thing was done as I have stated. I do not remember that I went that particular time into Mr. Miller's private office to tell him. I think I met him in the hall and we went into the office together and he brought out the jury box and set it down and we went through about the same process that I have described except that I think this last time we drew twenty names. I saw him rotate the box. He rotated it by turning it upside down and sidewise and putting his hand in and stirring up the cards on the inside. I have seen him do that at times. I do not remember just how many times he rotated it at this particular time.

Cross-examination.

By Mr. Wertz:

I have a record of the grand jury showing the manner of service upon the different persons. There were thirty drawn for that grand jury, I think. The return was incorrect in that it showed the names of three residents of Cleveland having been served by mail instead of by personal service. All members of that grand jury outside of the city of Cleveland were served by mail in registered letters, for which we got return receipts. All of the members on the grand jury included in the thirty who were residents within the corporate limits of Cleveland were served by hand. My record shows that absolutely.

Mr. Wertz: I would like to have the record show that the marshal's criminal docket shows that all members of this jury who resided in the city of Cleveland were served by personal
80 service and that those who resided outside of the city of Cleveland were served by registered mail.

By the Court: I have before me the criminal docket of the marshal's office, in which I am required to keep a record of the service, pages 207 and 208 of this docket, docket No. 7.

As to the return to the Clerk in which I say: "Received this writ at Cleveland, Ohio, June 16, 1917, and on the same day a copy was mailed to each of the following, who personally acknowledged summons in writing," which is followed by nineteen names, and then I go on and say: "The following named were excused by order of the court" and following that are eight names. I do not mean by that return that the eight names following the first nineteen names were not served at all. They were served and excused by the court after service. I mean this return to mean that 27 persons were served either by mail or by personal service and that three were not found in the district.

Redirect examination.

By Mr. Sharts:

In the list of petit jurors I have been testifying about there is no A. R. Pheeles. There is E. R. Peebles. The name on the

registry card is signed "E. R. Peebles." This is the official list of the names that was handed to me from the Clerk's office. The name on there is E. R. Peebles.

Mr. Sharts: I would like to have the card produced.

(Thereafter the card was produced by the Clerk and read "E. R. Peebles.")

81 The record I have read from is copied in my office under my supervision. Not by myself. I do not enter the things in there. The information that is put in there is derived from the returns that the deputies make. It is a record of all the work that we do in the office. Mr. Charles D. Bodine, a deputy in my office, keeps that record.

By the Court: I am required by law to keep a record of all transactions. As to how we identify the persons who apply to the court in answer to the summons by mail, together with the summons sent out we send out a time card, and the man when he comes in to report for jury duty presents the summons and the time card at the desk and we take it for granted that he is the person to whom the letter was sent.

By Mr. Wertz: The docket which I have here is kept under my direction.

82 July 18, 1917—9:00 a. m.

Thereupon the defendants' challenge to the array of the grand and petit juries was argued to the court. The court, upon consideration thereof, overruled the same, to which action of the court the defendants then and there duly excepted.

Thereupon counsel for the defendants presented and filed a motion to quash, which appears as a matter of record herein. Said motion was thereupon argued to the court, and the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Mr. Sharts: If your Honor please, we have now a plea in abatement which we would like to offer.

The Court: Can a plea in abatement be offered under the law after a motion to quash?

Mr. Sharts: I understand the procedure is, first, a motion to quash; next, a plea in abatement and third, a demurrer.

The Court: I supposed a motion to quash would be equivalent to a demurrer and that when a motion to quash was filed and overruled, neither a demurrer nor a plea in abatement was permissible thereafter. You have — inform me on that subject at 1:30.

83 July 18, 1917—1:30 p. m.

Mr. Sharts: If your Honor please, at the close of the morning session you intimated a doubt, or possibly a conviction on your part, that we had waived our right to file a plea in abatement by reason of our motion to quash. I have expended considerable

time this noon in looking up that point. I will admit it struck me rather unexpectedly. I had assumed all along that the federal court in such matters is controlled by the state court practice and I still take that position unless I can find something in the federal practice that is contrary thereto.

The Court: We will hear the matter on your request for leave to file your plea in abatement and objection thereto, if that is satisfactory to counsel.

Mr. Sharts: Yes. We offer our plea in abatement.

Mr. Wertz: If the plea in abatement is allowed to be filed, we would like permission to file a reply in the form of a general denial; also, as to this motion or pleading that was filed yesterday, the challenge to the array, we would like to have leave to file a general denial to that also. They are both sworn to, and as a matter of safety we would like leave to file that.

The Court: Leave will be given as there is no objection.

Mr. Kavanagh: That can be done by a nunc pro tunc order.

The Court: The record can show it as filed. Certainly the Court granted no leave and made no order for filing the challenge.

84 It was just filed as a matter of course by the defendants and appears on the appearance docket. Now, let us have your position, Mr. Sharts.

(Thereupon the matter was argued by counsel.)

The Court: Upon examin-g this plea in abatement, I perceive that it raises no questions which were not raised by the challenge to the array which was tried by the court, and, on evidence presented, held not to be sufficient. If I am wrong, that is giving you one ground of error.

Mr. Kavanagh: Mr. Sharts says except as to the 15th ground.

The Court: I would not permit under any circumstances evidence to be offered in support of the 15th allegation, nor proof to the contrary. There would be no way of disapproving that except by violating the secrecy of the grand jury room. I was going to say that, if I am wrong, I have given you one ground of error, for which you announced you were looking.

Mr. Sharts: In what form are you refusing it?

The Court: I am going to refuse it on the objection to its filing. I am not going to permit it to be filed and thereby give you the benefit of an additional proposed ground of error.

Mr. Kavanagh: If your Honor please, will you state for the benefit of the record, that there were two objections made by the Government; first, as to the right to file it after having filed the other pleadings, and, second——

85 The Court: I would sustain it upon three grounds, if you wish: first, because it is tendered for the first time at too late a day. Second, because it is tendered after the Court has heard and tried a challenge to the array, both of the grand and petit juries, and this involves, so far as it is sufficient at all, the same grounds. Third, I sustain it on the ground that it is not sufficient in law as a plea in abatement. You may have your exceptions.

Mr. Sharts: Enter the exceptions for the defendants to the ruling of the Court.

Thereupon counsel for the defendants presented and filed, with the permission of the Court, a demurrer on behalf of the defendants, as appears of record herein. Upon consideration thereof, the Court overruled said demurrer, to which the defendants thereupon duly excepted.

Thereupon counsel for the defendants moved the Court for a separate trial for each of the three defendants, Ruthenberg, Wagenknecht and Baker, so as to have them tried as individuals and not all three tried together. Counsel for the Government thereupon objected, and the Court, upon consideration thereof, thereupon denied the motion for separate trials of the defendants; to which action of the court the defendants and each of them thereupon duly excepted.

Thereupon each of the defendants was duly arraigned and each waived the reading of the indictment and entered a plea of not guilty.

86 Thereupon a jury was called and took their seats in the jury box.

During the examination by Mr. Sharts of the jury, in his examination of Mr. CHARLES P. SMITH, who was called on the jury, the following proceedings were had:

By Mr. Sharts:

Q. If the evidence should disclose to you that these men have been conducting this ardent and vehement campaign against the provisions of this draft act, urging its appeal, advising their hearers to bear in mind its unconstitutional features, as they believe, and also urging their opposition to the war in general, and it should develop that a young man hearing them should, even without any direct urging from them, have felt it incumbent upon himself to refuse to register, would that cause you to form an opinion unfavorable to these defendants in this case as to their guilt or innocence?

Mr. Wertz: I object.

The Court: That gets down to the question under the law that I would have to submit to the jury as to whether the natural, necessary, and probable result of what was being done produced the result claimed, and you are putting that question of law to the juryman to settle in his own mind.

Mr. Sharts: I was calling attention to the fact that supposing this evidence discloses that these men did not urge anyone not to register but did make a vehement protest against the law as a law and thereby a young man was induced, listening to them, to refuse to register, drawing his own conclusions not from what they

87 said but from their opposition to the law, whether this juror under those circumstances would form an opinion as to their guilt or innocence that would be unfavorable.

The Court: In a way, Mr. Sharts, you are rather asking the juror to give his opinion under the evidence and the law in this case. I will sustain the objection to that question.

Mr. Sharts: Enter our exception.

The Court: I am of the firm opinion that in this case, as in others, people must be held to intend the natural, necessary and probable consequences of their acts as proved in the case by the evidence, and it is for the jury to say from the evidence what is the necessary, natural and probable consequence of the acts alleged.

Mr. Sharts: Then let me put the question in this form: Suppose it should develop that these men have made a very ardent and vehement attack upon the law, criticising the law and criticising the president and the government in their public meetings but have advised their hearers to register in spite of the evil features of the law, as they see it, but it should develop that a young man listening to them has been induced thereby to refuse to register, would that affect your view as to their probable guilt or innocence, that circumstance, that they were urging their protest against the draft act?

Mr. Breitenstein: I object to the form of the question.

The Court: I will let him answer that question.

88 The Juror: I think it would influence me against them.

Mr. Sharts: I would like to challenge the juror for cause, if your Honor please.

The Court: I will get a little further information. Mr. Smith, have you formed in your own mind any opinion as to the guilt or innocence of the parties defendant in this case?

The Juror: No, sir.

The Court: Have you any personal familiarity, by hearsay or otherwise, with the alleged offense charged against them and the circumstances under which it was committed?

The Juror: Not much of one. I read some in the paper at the time this took place, something of that.

The Court: Do you remember now distinctly the circumstances and details which you read?

The Juror: No, sir.

The Court: Are you conscious of any bias or prejudice against these defendants or either of them which would influence or control your judgment and opinion as to their guilt or innocence according to the evidence as it may be produced before you and the law as it may be given to you by the Court?

The Juror: No, sir.

89 The Court: I repeat to you again: can you, in your opinion, serve upon this jury and render a verdict of guilty or not guilty according to the evidence as it may be presented and the law as I shall give it to you?

The Juror: Yes, sir.

The Court: I will overrule your challenge for cause.

Mr. Sharts: Enter our exception.

90 During the examination of the jury generally, the following proceedings were had:

Mr. Sharts: Is there any man here that does not know the distinction between the socialists and the anarchists?

Mr. Wertz: I object.

The Court: That is not a proper question.

Mr. Sharts: Is there any man here that does not know there is a very wide distinction between socialists and anarchists?

Mr. Wertz: I object to that.

The Court: I will sustain the objection to that question. I am not going into a discussion of that question.

Mr. Sharts: Enter the exception of the defendants to the ruling of the Court.

(Adjournment to July 19, 1917, 9:00 a. m.)

July 19, 1917—9:00 a. m.

(Examination of the jury resumed.)

(After the examination of the jury for cause was completed by counsel for both parties, the following proceedings were had:

Mr. Sharts: At this point, if your Honor please—I have not had the opportunity to look the point up and I do not know whether it has any merit at all—but I would like to interpose a challenge to the entire array before proceeding further, on the ground that we were certainly misled, not intentionally, by the drawing of the petit jury by the order of the court following the drawing of the grand jury in that we assumed that the petit jury which would try the case was the petit jury drawn following the drawing of the grand jury, and we spent considerable time and money looking up the antecedents of the men to sit on the petit jury, and we are now confronted with a petit jury who are strangers to us entirely. It places us at some disadvantage, and while I doubt if we have a legal right to object to that method of placing a petit jury before us, I would like to interpose a challenge on that ground.

The Court: The drawing was made of additional jurors for this term and the order was made in that form, and, inasmuch as the Court has allowed you wide latitude to inquire as to the qualification or disqualification of the jurymen tendered and there is not disclosed a shadow of objection as to any of the jurymen offered you, I shall overrule the challenge.

Mr. Sharts: Enter the exception of the defendants.

92 Mr. Kavanagh: Will the Court permit the record to show that this was not a drawing for this case but was drawn for additional petit jurors to serve for the term?

The Court: That appears by the record of the Court. The order is in that form.

(Thereupon both parties passed the jury for cause, and thereafter, both parties being satisfied with the jury, the jury was sworn as follows:)

The Court: The Clerk will swear the jury.

The Clerk: You and each of you do solemnly swear that you will well and truly try the issue joined in this case wherein the United States of America by indictment prosecutes Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker for

violation of the act of May 18, 1917, and a just and true verdict render therein according to the testimony and the law——

The Court: Just a moment. I did not understand that Mr. Schue was on trial in this case.

Mr. Wertz: He plead guilty.

The Court: Then is that a proper form of oath?

The Clerk: I was merely going by the title of the indictment.

The Court: All right.

The Clerk: —and a just and true verdict render therein according to the testimony and the law as it shall be given you by the Court, so help you God.

Mr. Sharts: I would like to interpose an exception to the form in which the announcement was made and the form of the oath.

93 I mean the announcement regarding Mr. Schue, in the presence of the jury.

Mr. Wertz: We can produce the record.

The Court: You may have your exception.

(Thereupon, after statements of the case to the jury by counsel for the respective parties, counsel for the Government proceeded to put in evidence on behalf of the Government as follows:)

94 Thereupon, the Government, to maintain the issues upon its part, called as a witness in its behalf, ALPHONS J. SCHUE, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Alphons J. Schue. I live at 2208 Elvira Street, Cleveland, Ohio, and on the 5th of June I lived at the same place. I am 22 years old, going on 23. I was 22 years of age the 7th day of last December. I am employed at Johnston & Jennings, Machinist. On June 5th I was employed by the Brown Hoist Company, manufacturers of cranes. I first learned of the conscription or registration law when I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please the act under which this indictment is drawn was passed, if your Honor will remember, on a certain date, and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that, subject to certain restrictions, but the question is not open to objection on that ground. The question is, on the 20th of May and prior thereto, what was his intent and purpose with respect to the registration provisions of that law. The objection will be overruled.

(Exception by defendants.)

A. I would have certainly registered if I had not heard
95 about these Socialist peace meetings.

Q. Whom did you hear speak on the 20th of May, if you remember?

Mr. Sharts: I object, if your Honor please. Has the witness by his answer indicated any meeting of any particular date?

The Court: He has not, but the question will lead to that. All of the facts cannot be covered in one question.

Mr. Sharts: I object to the leading form of that question.

The Court: The objection will be overruled.

(Exception by defendant.)

On Sunday, about the 20th of May, 1917, I was in the Public Square in the city of Cleveland. I heard speeches made there on that day. I know Baker spoke.

I heard some speeches on the Public Square on the Sunday following that, the 27th of May. An incident that occurred on the 27th of May that fixes that in my mind was the arrest of Wagenknecht.

Q. Now, do you recall what Baker said on the 20th of May, 1917, in substance, Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say, that you can recall?

A. And he told about the standpoint of the socialist party, the way they voted against conscription, and that it was taken by the local here that all socialists would refuse to register.

96 Q. What is the last part of the answer?

A. That all socialists would refuse to register and induce others, telling them they would have the full support of the socialist party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory I will ask you if you recall that he said anything about himself registering personally?

Mr. Sharts: I object to putting a suggestion like that in the question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance all you remember as to Mr. Baker's speech on the 20th of May at the Public Square; is that correct?

The Witness: Yes sir.

The Court: You may put the question, Mr. Wertz.

(Exception by defendant.)

The Witness: He said he would refuse to register, him being of military age.

Q. Do you know whether or not he did in fact register?

—. ——.

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney, anything in addition to what has already been said that Mr. Baker said on the subject with reference to being shot before
97 registering.

(Exception by defendants.)

A. He said he would rather be shot here as a man than be shot in the trenches of Europe as a dog.

Q. What, if anything, do you recall that he said in connection with the answer you have just given in connection with his registering or not registering?

A. I did not understand you there.

Q. Do you recall anything that he said in connection with his rather being shot, as to what that had to do with his registering or not registering?

A. No sir.

Q. In order to refresh your memory, I will ask you whether or not Baker said anything about the constitutionality of this conscription act?

A. Yes, sir.

Q. What did he say on that subject?

A. He said it is against the Constitution because a man is guaranteed the right of life, liberty and the pursuit of happiness, and a man being forced to do this, it is taking away his liberty and taking away even his life if he is forced and drafted into the trenches.

Q. Do you recall anything else that Baker said on that subject?

A. No, sir.

Q. Now, on the 27th of May, I will ask you if you remember who was the first speaker? That is the Sunday that the arrest was made of Wagenknecht that you testified to a while ago?
98 A. Max Hays.

Q. Do you recall the substance of Max Hays' address at that time or his speech?

A. Yes sir.

Q. What did Max Hays say?

A. About this conscription Max says as it is the law now you have got to abide by the law and the only way to show you are against the law is at the time the election comes around, to throw these people out who voted for this law.

Q. Now, as I understand you, Max Hays advised compliance with this law?

A. Yes, sir.

Q. Who was the next speaker following Max Hays?

A. Wagenknecht.

Q. What did Wagenknecht say in regard to Max Hays' statement that the law should be obeyed that you have just testified to, if anything?

A. He says it don't comply with the standpoint of the socialist party.

Q. That is, Hays' attitude, do you mean?

Mr. Sharts: I object.

The Court: I think the witness is proceeding in order, Mr. District Attorney. Proceed with the rest of your answer.

A. (continued). That ain't complying with the socialist standpoint and that he is not talking for the socialists; that they have taken a very decided stand on this here act of conscription, that all socialists would refuse to register, that it would not be the way Max says, that we do not have to obey this law.

99 Q. That is, who said that?

A. Wagenknecht said that—we do not have to obey this law.

Q. Do you recall anything else Wagenknecht said at that time?

A. He says up to conscription, up to disobeying or obeying laws, there is two things you can do: you can either disobey the law and go to jail or obey it and eat gravel and dust the rest of your life.

Q. In what connection did he use this last statement, as to the rest of your life, that you can eat gravel and dust all the rest of your life?

A. In what connection?

Q. Yes. What did he mean by that, as you understand?

A. He meant if you would register——

Mr. Sharts: I object to what he meant.

The Court: Yes.

Q. What did he say would happen to you if you registered, if anything?

A. What would happen?

Q. What you could do, if anything, if you registered?

A. If I would register I would be taking the chance of being drafted, being sent to the trenches; they could do with me just the way they wanted, set the Constitution aside, which gives a man the right of freedom; but by refusing I could stand up like a man and say at last to the capitalists that the working man at last had something to say here too.

Q. Now, I want to understand your answer in connection with the two things that you said Wagenknecht said you could do

100 in regard to this conscription act. What were those two things?

A. You can either obey the law and take the chance of being drafted or disobey the law and go to jail.

Q. Now, in what connection did he use that statement about eating dirt and sand, that you have testified to?

A. In connection with just what I have said.

Q. I do not understand you.

A. What is that?

Q. I do not believe the jury understands the answer.

A. In connection with just what I have said. If you are being drafted you are doing just what the capitalists want you to do and they can just force you to do anything then.

Q. Now, do you recall anything else that Wagenknecht said in that speech?

A. I do not.
Q. You say you cannot?
A. No, sir.
Q. In order to refresh your memory, I will ask you if you recall this statement——

Mr. Sharts: I object.
The Court: It is not permissible to put to him the statement that you want to elicit. You may direct his attention generally to the subject, as to whether or not anything was said relating to a given subject, and, if so, to tell what was said.

Q. In order to refresh your memory, I will ask you whether anything was said on the subject of fighting and fighting and fighting, and, if so, what was said?
A. He says: "We will fight and fight and fight until there
101 is no more fight left in us."
Q. Fight what?
A. This here act of conscription.
Q. In order to refresh your memory, I will ask you what, if anything, was said on the subject of protecting socialists who failed to register?
A. Yes sir.
Q. And, if so, what was said?
A. He said that it was the socialists' standpoint that all socialists of military age would refuse to register, as was voted in St. Louis, and all others that would refuse to register would have the full protection of the socialist party.
Q. Do you recall the time you were placed under arrest?
A. Yes, sir.
Q. What, if any, protection did they furnish you?
A. Not a thing.
Q. Now, following the arrest of Wagenknecht on May 27th, who was the next speaker?
A. Ruthenberg.
Q. Do you recall what Ruthenberg said in his speech to you?

The Court: His speech on that occasion.

A. I do not recall exactly but he said something about an act has occurred this afternoon like occurred in Russia.
Q. What is that?
A. An act occurred here this afternoon that has occurred in Russia right along.
Q. Do you recall anything else he said?
A. I recall talking against capitalism.
102 Q. What did he say against capitalism? I do not know that it is important.

Mr. Sharts: I think it is quite important, if your Honor please, that we shall know what——
Mr. Wertz: If you remember.
The Court: Do you wish to withdraw the question?

Mr. Wertz: Yes.

The Court: Of course, if it was a part of the remarks made by Mr. Ruthenberg on the public occasion referred to, it is all entitled to go in. It is not material who brings it out. It can be brought out on cross-examination and the Court would not undertake to control your discretion in doing it.

Mr. Wertz: I withdraw the question.

The Court: All right.

Q. Do you recall anything else that Ruthenberg said on any subject?

A. He said if he was of military age and if he was asked to go he would rather have his body riddled with bullets than to submit to this here registration.

Q. Do you recall anything else that Ruthenberg said?

A. No.

Q. In order to refresh your memory, I will ask you whether anything was said on the subject of opposing this law at the expense of sending every one of its members to jail and, if so, what was said?

The Court: By Ruthenberg, you mean?

Mr. Wertz: By Ruthenberg.

A. He said he would rather—if the members all stick, they
103 would rather all go to jail than to submit to this here law.

Q. I will ask you whether or not you recall anything that was said by Ruthenberg on the subject of newspapers and their hysterical appeals, if anything, and, if so, what was said?

A. That the newspapers are all under one—just like manufactured from one factory, that everything is just the same and it is hard for us to believe anything that we are being told by them.

Q. In order to refresh your memory I will ask you if you recall anything being said about Billy Sunday in connection with the conscription act?

A. No, sir.

Q. In order to refresh your memory I will ask you if you recall anything being said on the subject of having been bludgeoned and forced into the war against our will, and, if so, what was said?

The Court: That is, by Mr. Ruthenberg at the May 27th meeting?

Mr. Wertz: By Mr. Ruthenberg.

A. He said that we have been just like humbugged around, you know, and these here capitalists are the cause of it, and after robbing us of what we produce they even try to ask us to defend what we have been robbed of.

Q. Can you recall anything that Ruthenberg said as to the position of the socialist party in regard to conscription, and, if you do, what do you recall?

A. He says they have taken a very decided standpoint and it was being voted at St. Louis and they re-adopted at the local here and

they all refused, every socialist, to register and encourage
104 others not to.

Q. In order to refresh your memory, do you recall whether or not anything was said on the subject of the Thirteenth Amendment to the Constitution of the United States, and, if so, what was said?

A. Yes, sir. He says that it is against involuntary servitude?

Q. What else on that subject, if you recall?

A. I cannot recall nothing.

Q. Do you recall anything that he said in that connection in regard to the attitude of the courts, and, if so, what do you recall?

A. Nothing.

Q. What the courts had to do with this Thirteenth Amendment?

The Court: He says he recalls nothing said by Mr. Ruthenberg at that time on that subject.

Q. Now, do you recall anything that Ruthenberg said on the attitude of the socialist party in Cleveland in regard to this conscription act?

The Court: Has he not already answered that?

The Witness: I have.

Mr. Wertz: I think not, in Cleveland.

The Court: You may repeat what was said on that subject.

The Witness: They re-adopted this here what was in St. Louis, that all socialists refused to register.

Q. In order to refresh your memory, I will ask you if you remember anything he said about what he would do in case he came between the ages provided for in that law?

105 A. He said he would refuse to register, rather have his body riddled with bullets.

Q. I will ask you if he said anything in that connection in the event that the law was amended to cover the age in which he was?

A. Yes, sir. He said if the law gets amended that it takes in his age, he will refuse.

Q. I will ask you if you recall anything that he said upon the question of rather going to jail than to the trenches?

Mr. Sharts: I object. That has, I think, been covered.

Q. If so, what do you recall on that question.

The Court: I will let the question be answered once more.

A. He said he would rather go to jail than go to work and go to the trenches.

Q. Now, Mr. Schue, as the result of these speeches that you have testified to, of Mr. Baker and Mr. Ruthenberg and Mr. Wakenknecht, what conclusion did you reach in your own mind as to registering or not registering?

A. After these speeches I made up my mind not to register, hearing the way it was against the Constitution, which I believed

they knew more than me. I thought it was right and I refused to register.

Q. These are the men here, Ruthenberg, Wagenknecht and Baker? (Referring to defendants.)

A. Yes, sir.

Cross-examination.

By Mr. Sharts:

I was born in Cleveland, Ohio. My mother was born in Germany and my father was born in Alsace, the French part. Both of
106 my parents have been German subjects since 1870. I am a machinist. I am not a member of the Union.

Q. Have you attended other socialist meetings besides those that you have mentioned on May 20th and May 27th?

A. No, sir.

Q. Those are the only meetings that you have attended?

A. Yes, sir.

Q. Did you ever read any socialist literature?

A. No, sir.

Q. Never read any socialist literature, and so the opinion that you formed of what these men were advocating was formed entirely from what you heard on May 20th and May 27th from word of mouth?

A. Yes, sir.

Q. On May 20th down here at the Public Square you said that Baker spoke. Was this meeting of May 27th at the same place?

A. May 27th?

Q. Yes, the same place as May 20th?

A. Yes, sir.

Q. At the Public Square?

A. Yes, sir.

Q. That is to say, Baker spoke on May 20th in the Public Square and Mr. Ruthenberg and Wagenknecht spoke on May 27th in the Public Square?

A. Yes, sir. When Baker spoke, he stood on a stone in the Square about six feet from the Recruiting Office. The Recruiting
107 Office was not put up at that time, I hardly think. It is up there now.

When Mr. Baker was speaking, they said there were about two thousand people there. I am no judge of numbers, I can't say if it is 500 or 100. I will put it at about 500.

During the time Mr. Baker was speaking, there was no interruption. There was a man who introduced Mr. Baker to the crowd. I do not know him. I had never seen Mr. Baker before. I seen him at the meeting. That is the first time I ever saw him. I knew it was Mr. Baker by him being introduced. That light haired fellow there is Mr. Baker. (Referring to defendant Baker.) The man who introduced Mr. Baker was none of these persons (indicating defendants). I have not seen him around the court room and do not see him here now. My eyes are pretty fair.

Mr. Baker spoke between twenty minutes and half a hour, I guess. I believe Mr. Ruthenberg followed him. I was not there all the while steady during Mr. Ruthenberg's speech. I stayed through Baker's speech. After Mr. Baker stepped down and Mr. Ruthenberg got up, I stayed around the Square there for about half a hour or so, just walking around. I was not particularly interested in what was said right there. I had not lost interest. I made up my mind to go home pretty soon. I stayed around about half an hour walking around the Square and went home. During that time I did not meet any one I knew. I went home on the street car. I did not see any one on the street car that I remember. That was about five o'clock, I believe. I took a car on the Public Square.

108 I believe they started speaking about two-thirty. Baker must have spoken between three and four. The first man talked about half an hour or three-quarters of an hour. He talked longer than Baker. The first man was Tom Clifford. I heard all that he said. During the time Tom Clifford was speaking, I stood about six feet away from him. The crowd was right up around Mr. Clifford, and I was a short distance behind the front of the crowd. They were packed in, but you could get out if you wanted to. I recognized Tom Clifford. I heard him talk about three-quarters of an hour. Baker was the next speaker, and talked about twenty minutes. During that time I remember all of this that I have testified that Mr. Baker said. During the time that Mr. Baker was speaking, I did not see any stenographer in the crowd. There must have been about fifty police there, I guess, scattered through the crowd.

While the speaking was going on, the crowd applauded frequently. The speaker interrupted a while until they were through. I can't just say if I did not miss anything that was said because with the applause I could not hear just too good. The applause breaking in now and then drowned out the words of the speaker. That was true about Clifford's speech. There was applause when Baker got up. While he talked during this twenty minutes I think the crowd interrupted him about ten times. About every two minutes they would break into applause. There was pretty loud applause. It was prolonged, I should judge, for about a minute or so. Not each time. Some were longer than others. There was no roughing in

109 the crowd, only applauding whenever they talked to please them. The crowd seemed to be worked up. It was receiving these remarks pretty warmly and making a good deal of noise to show their approval. During the entire time I was there and on my way home I did not see any one that I knew. I believe I took a Lorain street car that day at the Square. The street cars were running all the time as usual while the speaking was going on, I believe. There was considerable noise from that source there all the time the speaking was going on. In spite of that I believe I heard everything that Baker said.

As to how I know they were talking on May 20th instead of May 18th, for example, I have only attended on Sundays and I can look at the calendar and see what a Sunday is marked. And I ought

to see at what time I can remember when these speeches were. I have not looked on a calendar since then. I have talked with the District Attorney. I told him it was in May, the last or second last Sunday, but I know it was a Sunday. That was the Baker speech. It seemed to me it was the second last Sunday in May, and I talked it over with the District Attorney, and he fixed that date in my memory. There was a meeting earlier than May 20th, the first one that was held in the rain. I could not tell you what day in May that was. I attended that.

As to whether I particularly distinguished what Mr. Clifford was saying from what Baker was saying, the talk was all generally against capitalism and against conscription and registration. I cannot recall to my mind that I heard Mr. Ruthenberg talk on
110 May 20th. I am clear about him speaking on the 27th. He may have talked on the 20th, and he may have said some things that I remember on May 20th. Mr. Clifford and Mr. Baker and Mr. Ruthenberg all talked about on the same subject, only said the words different. When Mr. Clifford talked I paid just as close attention as when Mr. Baker talked. When Mr. Ruthenberg talked on the 20th, I walked around the Square. I know positively Clifford talked against conscription.

Q. Can you state positively whether Clifford talked about registration or do you consider those the same thing?

A. I take them the same.

Q. That is, you do not distinguish between registration and conscription?

A. I know he talked against registration, and if you talk against registration you talk against conscription.

Q. And if you talk against conscription you thought that was a talk against registration, didn't you?

A. I know the word when he says "registration." I know he is talking against it then.

Q. Did he use the word "conscription?"

A. Yes, sir.

Q. Did he use the word "conscription" or "registration" each time just as you have given it?

A. He used them both.

Q. You did not distinguish when he said "conscription" and when he said "registration," did you?

A. I surely ought to know the difference in the word.

111 Q. I do not mean the difference in the word, but did it convey any different meaning to your mind?

A. I just don't understand you on that part.

Q. That is, do you confuse registration with conscription, consider them practically the same terms?

A. No, I do not.

Q. Meaning the same thing?

A. No, I do not.

Q. Or do you have a difference in your mind?

A. I have a difference in my mind.

Q. What is the difference?

A. The difference in my mind is if you are registering you are only going down and writing your name, where conscription is just *liking* drafting; they can draft you.

Q. Now, how long have you kept that distinction in mind?

A. Since I have heard these socialist speeches.

Q. Did they distinguish between the two?

A. They have talked against——

Q. Did they point out the difference between registering and being conscripted?

A. Yes sir.

Q. They pointed out the difference?

A. Yes, sir. They said if you are registering you are running chances of being drafted. That means as much that you are running chances of being conscripted.

Q. That is, you say that drafting and conscripting are the same?

A. They seem the same to me.

112 Q. And registration did not seem to you very different, did it?

A. It is entirely different, yes.

I would say it was about the center and near the finish of Mr. Clifford's speech that he made the remark about conscription. Generally when he talked of registration, he talked of conscription, because the talk was not of conscription, the talk was against registering June 5th, and the results was pointed out, what it would be if you would register June 5th. He talked of registering and conscripting all at once. I do not know exactly in what part of Baker's speech he talked of conscription. I know it was in his speech though. He did not start right out about conscription, not the first word right out. I do not remember what he did say at the first. I cannot recall any statement that he made at the beginning. As to whether I remember how he closed his remarks, I know he says about him being arrested in Akron, or wherever it was, and there when it was questioned him what he would rather do—to be drafted and go to the trenches or be shot, then he said, "I would rather be shot here as a man than in the trenches as a dog." He said that he had said that at Akron. I don't know if he exactly closed his speech in that way. I can't recollect just how he did wind up his speech.

As to what he said about capitalism, he says capitalism is the cause of this war, because there are foreign markets, one trying to overdo the others, and then our being robbed out of this here money, and then it is up to them yet—they go to work and call us

113 to defend what they robbed us out of. They all talked about the same. I can say Baker said this. He said the whole socialist party is opposed to war. He explained how the socialists voted in St. Louis, and re-adopted this here principle of not registering, that all socialists would stand to this and would not register. Baker said something about the St. Louis meeting, but I cannot recall what he said as to what kind of a meeting it was. It was something about registering, that they had decided not to register. I do not know what kind of action had been taken there, but he said

something about St. Louis when he talked. I don't know whether that was at the beginning of his speech. About the center or the end of Baker's speech he remarked about conscription. I cannot give you the exact language that he used when he spoke about conscription. The substance of what he said, as I understood, was that he was of military age and would refuse to register and advised others not to register.

Q. Now, let me ask you, Mr. Schue, whether or not you are positive he said "register" or "conscript," or whether he used the word "conscription," that he was of military age and he would refuse to be conscripted?

A. I believe that he said that he would refuse to register.

Q. You believe it?

A. Yes, sir.

Q. But you have been giving us the substance and not the exact language?

A. I cannot recall the exact language because I have not
114 copied it in shorthand or typewriting.

Q. You simply got that inference from his speech in a general way, that he was saying that he would not register?

A. Yes, sir.

Q. He may have said, "I will refuse to be conscripted"? You would not positively deny that, would you?

A. He may have said it later on.

Q. Could not he have been saying that at that time?

A. If he says: "I will refuse to register" he would surely follow by saying: "I refuse to be conscripted."

Q. That is, it would be the same thing in your mind?

A. It would not be the same thing. I says he would follow with that.

When he said that this was the standpoint of the socialist party, that he would refuse to register and this was the standpoint of the socialists, I gathered from his remarks that all the socialists were going to refuse to register, and were going to defy the law requiring them to register. He talked against registration and he advised others not to. While he was talking of conscription, talking of the socialist standpoint, while advising all others, to cheer them along, I guess, he brought it in that he, too, would refuse to register. It was in that connection that he brought in about all the socialists refusing. He made the remark that he would rather be shot here as a man than be shot in the trenches of Europe as a dog. He said that he said that some place to a reporter, I guess, and he brought that remark up again. He was repeating something that he had said to some man at some other time. He said somebody
115 asked him what he would do, whether he would register or not, and he said that he told that man that he would rather be shot as a man here than out in the trenches be shot like a dog. I believe that Baker made these remarks after he said that this act was against the Constitution. First he talked about the constitution and then he talked about registration, and that he was willing to be shot like a man for not registering.

On May 27th Max Hayes was the first speaker. I do not know him personally. I know it was Max Hayes by his being introduced. I could point him out if he was here. I do not see him around here. When this man introduced Max Hayes, it was on the Public Square over at the other stone, right across them Marshall's Drug Store. Max Hayes talked the Sunday that Wagenknecht was arrested, the Sunday immediately following the speech of Baker. They were standing on a stone step. The street cars run along there and were running at the time. The speakers judged the crowd to be about two thousand, and mentioned it as about two thousand in their speeches. I cannot recall which speakers mentioned it.

In the second meeting, the first speaker, Max Hayes, talked on the conscription law and said it was the law and they should abide by the law. I should judge he talked about one hour and fifteen minutes. I heard him the whole time. I was standing about twelve feet away from the platform, right in the middle of the crowd. I should say there were about fifty policemen around. I did not see any stenographer or anybody taking it down in shorthand. The crowd was just packed in up against the platform. After
116 Max Hayes talked, Wagenknecht was next. All of this time I was standing. Wagennecht talked about fifteen minutes. During the time he was talking there was much interruptions from the crowd in the form of applauding, shoutings and hand-claps. I did not notice anything else by way of interruptions. These interruptions were frequent, and some of them were prolonged. At the start, he criticised the remarks of Mr. Hayes. He says that Hayes is not repre-senting the socialists, that Max Hayes' remarks were not in line with the Socialist position. During the whole time that Max Hayes was talking I gave close attention. All that I remember about Max Hayes' talk was that he said that the conscript law is a law and we must abide by the law. He talked about capitalism, talked about the way the people have got in different countries, about how the people have got it in Australia by sticking together, and how the people are advancing and freeing themselves in Russia, and he talked on this Conscription Act. The main part of his remarks the way it seemed to me, was capitalism and conscription. He used the word "conscription" and he used "registration." I cannot recall whether he used the word "draft." While he was talking he was sometimes interrupted by applause. I applauded once in a while. When Wagenknecht talked, I also applauded. I know the person who acted as chairman introduced Max Hayes. It was not the same man who introduced the next speaker. A different man introduced Wagenknecht. While I was listening to Max Hayes, I did not meet any person in the crowd that I knew. I did not see any faces around there that I recognized. After
117 Wagenknecht had talked about fifteen minutes I did not see anybody that I knew. I saw the arrest of Mr. Wagenknecht. I do not know who it was that arrested him. When he was arrested I did not go with the crowd. I guess the crowd went down to the court house, following the policeman who walked down with him. I listened to the other speech and then I went down.

The crowd was just a few minutes in departing, and then the other speaker started, Mr. Ruthenberg. I had never seen or met Mr. Wagenknecht before and did not know him by name before. I did not know Mr. Ruthenberg before. I had heard him.

Q. Had you ever had any communication at all with him?

A. No, sir.

Q. Or with the Socialists?

A. No, sir.

Q. Never had done anything at all to identify yourself with the Socialist party?

A. No, sir.

After Mr. Wagenknecht was taken away, Mr. Ruthenberg got up. He was introduced by a man whose name I do not know. He was here in the court room. I can't see him now. Mr. Ruthenberg must have talked about half an hour or forty minutes. I listened clear through. Mr. Wagenknecht was no more than taken off the stand than the man got up on the stand and introduced Mr. Ruthenberg. He said the people should stay there, should not follow the policeman, should listen to the next speaker. He talked about two minutes. The man who introduced Max Hayes talked about
118 a minute or so. The man who introduced Wagenknecht talked a minute or two. After Wagenknecht had talked fifteen minutes, there was a little interval of confusion. I should say it took about three minutes until the crowd had quieted down and the next speaker could go on after Wagenknecht's arrest. On the assumption that Ruthenberg talked thirty minutes, I stood there two hours and some five minutes listening. Mr. Ruthenberg's remarks were made at the close of this meeting. I had been giving close attention through it all.

It was Wagenknecht that made the remark that the Socialist Party has taken a decided stand against conscription. His exact language, as I remember it, was, he said the Socialists have taken a very decided stand upon "This here act" or "Upon this here Conscription Act." I cannot give you the exact words. He says: "We will fight and fight till there is no more fight in us until this Conscription Act is erased off of the statute books." He said: "You have got two things in this here. In obeying and disobeying the law. You can either obey the law and go to work and eat sand and dust the rest of your life, or else disobey and stand up like a man and go to jail." He gave them the Socialist standpoint there, and the other speakers had said all those that would not register would have the full support of the Socialist Party. I cannot repeat what Mr. Wagenknecht said on that occasion immediately following Max Hayes, but anyhow he says Hayes is not talking or representing the Socialist Party and his idea is different from the socialists. I cannot recall that he went into any elaboration of what the difference was. He then went on to talk about the
119 standpoint of the Socialist Party with regard to conscription and that they should not obey conscription and that they should fight and fight and fight until they had this statute erased from the statute books, and he told them they could either

obey the law and take the chance of being drafted or they could disobey and go to jail. I do not remember what his concluding remarks were when the police came and arrested him, but I just know it was against conscription. Then the police jumped in and arrested him right in the midst of what he was saying.

After Mr. Ruthenberg had arisen, there was applause. I heard what Mr. Ruthenberg said at the beginning of his remarks. I think the substance of his opening remarks was: "An act has occurred here this afternoon just like has been occurring in Russia right along." I do not recall what followed that. The next thing he said that stuck in my mind is about capitalism. After he talked on capitalism, he talked about registration. He said he would rather have his body riddled with bullets than to submit to conscription That is his language as close as I can recall it. I cannot recall anything further. The part which I have given you is what I do remember clearly. I cannot give you the wording of anything beyond that. I can recall it if I have got an impression of it. At the close of Mr. Ruthenberg's remarks, I walked down to the jail and walked around the jail.

(Thereupon the court cautioned the jury as to their conduct and adjourned until 1:30 p. m.)

120 (1:30 p. m., July 19, 1917.)

Mr. Kavanagh: Mr. Sharts, have you any objection to this answer being filed as of July 17, without a formal order?

(Handing paper to Mr. Sharts.)

Mr. Sharts: If your Honor please, I must interpose my objection. They at that time when I asked that they file an answer or a demurrer so as to make an issue, or file exceptions, did not do it, and the Court ruled that they were not required to, and it seems to me, if they made a mistake, and the Court was wrong in his ruling, they ought not to be permitted to correct it at this time, after the challenge to the array has all been disposed of.

The Court: I remember that yesterday the request was made that they might do so.

Mr. Kavanagh: Before you disposed of it.

The Court: Before the jury was impanelled, and the defendant did not object and I said if there was no objection that might be done.

Mr. Sharts: That was in regard to the plea in abatement.

The Court: With regard to both.

Mr. Sharts: I certainly did not understand that they were asking at that day to file an answer to the challenge to the array. I thought it was simply in case your Honor permitted a plea in abatement to be filed.

The Court: I understood it the other way. I will take the paper and will have the stenographer look up what occurred and then decide what should be done.

(Thereupon the examination of the witness Alphons J. Schue was resumed as follows):

121 Cross-examination (Continued).

By Mr. Shrts:

At the time that Mr. Ruthenberg was speaking, there was another meeting being held on the Public Square by some religious order. I did not notice what order. They stood right across from Marshall's Drug Store, on the same stand as Mr. Ruthenberg. They gave way for the Socialist party because at that time they can only take the one stand, and they gave way for these to use the stand to speak. During the time that Mr. Ruthenberg was speaking, there was music at the Recruiting Station. I cannot just recall whether it was at that time. I know there was music there, of a life and drum corps. I cannot say if they were speaking for recruiting or what for. I heard some noise there. This was while Mr. Ruthenberg was speaking. I do not know whether the music had been playing for some time, but I know it started while he was speaking, while I was there. I could not say for sure whether or not it was playing while Mr. Wagenknecht was speaking. I do not believe it was playing when Mr. Hayes was speaking. It might have been playing while Mr. Wagenknecht was talking and I am sure it was playing while Mr. Ruthenberg was speaking. I do not recall any other noise on the Square while this talking was going on. After Mr. Ruthenberg finished, I went down to the police station immediately, just to see where the crowd went to, and then went home. I did not meet any acquaintance there that I talked with and did not enter into conversation with any one that I can recall.

122 Redirect examination.

By Mr. Wertz:

Q. Were you on the 5th of June an enlisted man in the regular army, navy, marine corps, national guard or naval militia in the service of the United States, or an officer in the reserve corps or an enlisted man in the enlisted reserve corps in active service?

A. No, sir.

Mr. Sharts: I will ask the Court to strike out that answer for the reason that on redirect examination, if I am correctly informed, under the rules of evidence, they cannot introduce new matter.

The Court: I will permit the inquiry to be made, in my discretion.

(Exception by defendants.)

123 Mr. Wertz: I would like to offer now the record in this case, which shows that Alphonse J. Schue plead to this indictment.

The Court: Produce the record, Mr. Clerk.
The Clerk: The record is in court, if your Honor please.
Mr. Wertz: I will call Mr. Denzler.

Thereupon, FRED J. DENZLER, was called as a witness in behalf of the Government and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

Q. I am asking you now, in connection with the case of the United States versus Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, No. 3873, pending in this court, when Alphons J. Schue was arraigned and plead to that indictment, what his plea was?

A. On July 5th, the defendant A. J. Schue was arraigned. He plead guilty in manner and form as he is by the indictment therein and thereby charged.

The Court: Any cross examination?
Mr. Sharts: No sir.

124 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, JAMES L. LIND, who, being first duly sworn, testified as follows:

Direct examination.

My Mr. Wertz:

My name is James L. Lind. I am Chief Assistant Police prosecutor of the city of Cleveland. I am acquainted with Mr. Wagenknecht, Mr. Ruthenberg and Mr. Baker. I was present on the Public Square on the 20th of May, 1917, on the occasion when Mr. Baker made a speech. On that occasion Mr. Baker started off with a talk with reference to the war in Europe and the cause of the war. He said that the foreign countries had been dragged into the war by reason of the system of over-production, as he termed it, and it was for the purpose of seeking the new markets for that over-production of the capitalist class. He talked at length on that and then he referred to the conscription law, saying that the national party in convention at St. Louis had passed a resolution in which they were opposed to the conscription proposition, and he said also that the socialists of the state had re-enacted that same resolution. Of course, his exact words I do not entirely remember all the way through for the reason that I heard several meetings and heard several speakers at each one. He said that by the conscription law, if a man failed to register, he could be sent to jail, and then said that there are two things you can do. You can either register and go to murder your fellow workmen or else you can go to jail, and then—I think in a joking way—he said something about "Then the capitalists
125 will have to feed you," and then he closed up with—There was more said, of course, with reference to this conscription,

but that in substance is what I remember of the speech. I think he said the Socialist Party would defend those arrested for failing to register. He also said this, that the law was unconstitutional, and referred to the section of the constitution which provided that a man's right to his pursuit of happiness shall be inviolate. That is about all that I recall of his speech. I do not recall whether he read a resolution or not. The resolution of the National socialist party was referred to and he gave it in substance, but whether he read it or not I don't know. I do not recall whether Baker said he personally would or would not register. It was a speech that took all told, I think, over half an hour to deliver, and perhaps fifteen or twenty minutes of that was devoted more especially to the causes of the war and a discussion of the war situation, and then he said there was this other subject of conscription and registration, and I have given, I think, the main things that I remember that were said there by Baker. I do not recall anything else that he said on the question of registration other than what I have testified to.

I was present at the Police Station on the 27th of May when Wagenknecht was brought over there. On that occasion he told us his full name and address and that he was employed by the Socialist Party as a state organizer, I think, and that he had been so
126 employed since December of 1916. He said that he had been interested in socialism practically all of his life and that at times he devoted all of his time to the party and that at other times when the party did not have enough funds he had other employment. He talked about his speech of the 27th just immediately previous to his coming to the station house. Parts of the speech were read to him. I think the parts that were read went something about as follows: something about, "we, the socialist party, will fight and fight and fight this conscription law to the end." He was asked if he had said that and replied, yes, he did. Of course, other parts of the speech were read and there was a whole lot more said. I asked the stenographer, Frank Farasey, to read from his stenographic notes.

I was in the crowd and heard Max Hayes make his speech on the 27th of May. He was the first speaker, if I am not mistaken. Max Hayes in his speech advised the socialists to band together to have the law repealed by means of political action and said further that he would not advise any one of age not to register, and so when Wagenknecht came over to the station, I said: "Well, Max Hayes kind of upset the dope today." I think I used that slang expression. "You did not expect him to talk in that tone, did you?" I think his answer was: "Not exactly," and then another answer to that question put at the same time was: "Well, Max Hayes has been away from the party somewhat of late." Whether that was to that first question or not—several times we referred to that matter of
127 Hayes' talk being along a different line than Wagenknecht's—and then there was some talk about Wagenknecht, as to his apparently fiery way of making his speech. I think I asked him if he was angry because Max Hayes had talked in the tone he did. Something along that line was said. In Wagenknecht's speech on the Square, he said that Max Hayes in his speech did not represent

the platform or program of the Socialists with reference to conscription, and that he reiterated again, I think, in the meeting at the police station. Max Hayes had said that he would not advise any one not to register, he would advise any one of age to register, but that he felt the law should be repealed in the legal way, that is, by banding together politically. I referred to Hayes' statement and attitude in talking with Mr. Wagenknecht after he was brought to the jail and I said: "Max Hayes kind of upset the dope today, didn't he," or something along that line, or to the effect that Max Hayes evidently did not go in line with the rest of the speakers. There was something said about free speech, if I am not mistaken, and I said that it was not our purpose to interfere in any way with free speech, but I did not feel that when a man was advising violation of the laws that that was in any way what was meant by free speech. It seems to me that Wagenknecht replied either to that or some similar question: "Well, maybe I did go too far." I made a comparison to Wagenknecht, comparing Hayes' attitude to his in regard to advocating the violation of the law, but do not exactly recall what he said in answer to that.

128 Cross-examination.

By Mr. Sharts:

I have not testified as to all of Mr. Wagenknecht's statement with regard to the affair of May 27th. I heard the speech of Mr. Wagenknecht on May 27th on the Square, I did not testify as to all I recalled of that speech. As to what else I recall, he got up, as I say, real excited and seemed to be in a hurry to say what he had to say. His face was flushed and his first statement was to the crowd that he did not—that Max Hays did not represent the socialist party in his speech just finished. Then later on he said that the socialist party was unalterably opposed to the conscription law and would fight and fight it to the end he said—and this was in a very excitable way that he said this—he said: "Now, you can either go to jail or go to murder your brothers. You have a choice of one of two things. You can either go to jail"—and he repeated that several times, and the crowd at that point yelled, "Jail, jail," a couple of times, the people in the audience back of me yelled, and then it was just shortly after that that he was taken from the platform and taken over to the station. He was interrupted in his speech. I heard him use the words distinctly, that they were going to fight and fight and fight against this conscription law. I think he might have said "until it will be erased from the statute books" at one point. I do not have a distinct recollection that it was said, of that part of it. I have of the use of the words "fight and fight and fight" the conscription. You see I heard meetings on the 6th and 20th
129 and 27th and then a few other Sundays following that and so I do not remember them as well probably as if I had only heard one. He pointed out the distinction between what Max Hayes said and the position of the socialist party. That distinction, as I got it, was that Max Hayes would advocate a repeal of the law by

means of numbers in a vote of some sort and through Congress, but that the socialist party were advising young men not to register. He did not use those words, but he referred to the national platform. He said that the party stood by that national platform in St. Louis, if I am not mistaken. I do not recall anything in his speech that indicated that they would not stand by the entire national platform. I remained there after Wagenknecht was arrested on the 27th. Mr. Ruthenberg talked.

Redirect examination.

By Mr. Wertz:

I recall asking the question: "Hayes evidently does not believe in advocating the violation of law and that is where he differs from you?" I do not recall what Mr. Wagenknecht answered in reply to that question. I do know, in answer to that, he said this, that the socialist party were opposed to the registration-conscription law and were advising refusal to register and that Hayes had simply advised that they work together to get the law from the statute books.

130 Recorss-examination.

By Mr. Sharts:

Q. This statement that you refer to, was it at the police station?
A. Yes, in the police inspector's office.
Q. Was Mr. Schue present?
A. I don't think so. I don't know Mr. Schue.

Mr. Sharts: If your Honor please, I am going to ask to have the testimony of this witness with regard to any admissions made by Mr. Wagenknecht at the police station stricken out as not having been made in the presence of Mr. Schue.

The Court: I will overrule your request and you may have your exception, but I will make this statement in addition to that——

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony given by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

Mr. Wertz: I ask the court to add only as it applies to Mr. Wagenknecht.

The Court: Yes; that which transpired down there can only be regarded by the jury as it applies to Mr. Wagenknecht.

131 When I questioned Mr. Wagenknecht at the police station asking him about the position that the socialist party took, I was clear in my own mind as to the position of the socialist party. I thought I knew what their position was because I had heard six or seven speakers. I had heard Wagenknecht and Ruthenberg and Tom Clifford and some man whose name I do not recall now—I think he was representing the socialist labor party—and there

was one other speaker whose name I do not recall, on the different Sundays. I heard some of these talks on May 6th, 20th and 27th. I do not necessarily consider the statement of the socialist labor party speakers as showing the position of the socialist party, only as they were reiterated by the socialists when they talked. It was a joint meeting. It was announced as a joint meeting of the two organizations. I am not positive whether that was the meeting of May 6th, or the one of May 20th. My best recollection is that it was the one of May 6th. I understand that was before the law was passed. The statements that they made at that time were with reference to a law that they saw impending possibly, but not yet enacted, I guess. I heard everything that Ruthenberg and Wagenknecht said on the 20th and on the 27th, and it was from that that I got my impressions as to the position of the party. After listening to the speeches of May 6th, I did not cause the arrest of any of the socialist speakers, nor on May 20th. I heard the speech of Mr. Ruthenberg following Mr. Wagenknecht on May 27th. I did not cause the arrest of Mr. Ruthenberg.

132 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, S. J. STUCKY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Breitenstein:

My name is S. J. Stucky. I reside at 7811 Platten Avenue. My occupation is that of Patrolman on the police force of the city of Cleveland. I have been a patrolman in the police force of the City of Cleveland for six years. I was such officer on the 20th day of May of this year, and on the afternoon of Sunday, May 20th, of this year, I was assigned to the northwest corner of the Square in the city of Cleveland. I heard several speakers on the Public Square on the Sunday afternoon, May 20th of this year. One was Baker, the gentleman there. (Indicating defendant Baker.) Ruthenberg is another one. What I heard Baker say in that public address on the 20th of May, in substance, was: He spoke more on the foreign affairs and the market, as to how the war was brought about, the condition of the capitalists and the affairs of Europe, and as a socialist speaker he spoke on conscription, which he said was unconstitutional, and if he was in the age limit, which he is required to register on the 5th day of June, he would rather go to jail than go over and shoot down his brother men, and if there was any young man in the audience between that age, they can have the same privilege of going to jail or registering, which the capitalists would feed them while they were there. That during a national convention
133 at St. Louis the socialists as a body opposed the war and as a body they would try to repeal the law, and he then spoke on different capitalists and the market, and the market was open and when the capitalists wanted to find a new market, in order to declare the war, it was brought about, they had to find a way and a

means to ship their produce to a foreign market. He said that the conscription law was unconstitutional and if he was of the age of conscription when he was called on the 5th day of June to register, he would rather go to jail than to shoot down his brother men. He said he was within the age limit, and would be called upon to register the same as the rest of the young men within this ordinance, and when he would be called upon to register he would rather go to jail than shoot down his brother men. With reference to the socialist party aiding any of those who refused to register in accordance with the provisions of the selective conscription act, he said that if any of them were arrested they would see that they were taken care of to their best ability as they could. That is all that I can recall in reference to the registration and the conscription law.

I came to the Public Square on Sunday afternoon of the 20th of May of this year at 1:15 with a squad, and remained there until about 5:45. I was there all the time between 1:15 and 5:45. With reference to the place where the speaker was standing on that
134 afternoon, I was about eight to ten feet from the rostrum, that is, the speaker's stand, more in the southwest corner of the speaker's stand, within eight or ten feet of it. I heard practically all that the speaker said. I was there during the entire speech of Mr. Baker. I heard Mr. Ruthenberg speak on that afternoon. I could not say whether he was there during the time Mr. Baker was speaking. There was quite a crowd there. He was there a part of the time. I could not say whether he was there all of the time or not.

Cross-examination.

By Mr. Sharts:

The speech of Mr. Baker that I listened to was on the 20th. I did not say there was a socialist labor speaker there. Mr. Baker began, I should judge, about two or two fifteen, somewheres near that time. There was another party speaking before him, but I do not know his name.

I have never seen this young man Schue before that I know of. I do not know him. (Mr. Schue stands up.) I never saw that man to my knowledge. I did not see him there on May 20th that I know of.

Mr. Baker spoke about 25 minutes, I should judge. During that time there must have been a crowd of about 1500 people, I should judge. They applauded once or twice while Mr. Baker was speaking. When Mr. Baker was speaking he would turn. He would talk at one time in one direction and at another time in another. He never turned his back in my direction. When he would turn from
135 side to side, naturally his voice being throwed on a side as he kind of turned, it would become more or less distinct. He did not turn all the way around; more of a quarter of a turn of a circle. When he turned away I could hear every word. During the time he was speaking you can hear the noise of the street cars passing, and people passing there at all hours. That afternoon there was another meeting a little further over, some religious meeting.

That was on May 20th. There was no recruiting going on at that time that I know of.

I was present on May 27th. While Mr. Baker was speaking, I saw Mr. Lind, the police prosecutor, there. There was no interruption of Mr. Baker by the prosecutor that I saw. He was not placed under arrest on the 20th. Mr. Baker was not prevented from making any statements. When he finished, he left the audience, as far as I could see of him. The meeting closed, I should judge about 4:45 or 5:00 o'clock.

When Mr. Ruthenberg was speaking, the police prosecutor was there part of the time. After Mr. Ruthenberg finished speaking on the 20th, there was no arrest made of either Mr. Baker or Mr. Ruthenberg. When Mr. Baker was speaking, there were, I should judge, about 20 police throughout the Square, and about the same number when Mr. Ruthenberg was speaking. I was present when Mr. Wagenknecht was speaking on May 27th, but I was not the arresting officer. Mr. Baker in his talk said that conscription was unconstitutional. He said he was within the age limit, the same as a good number more of the young men within the hearing of
136 his voice, and if he was called upon to register on the 5th of June he would rather go to jail than go over and shoot down his brother men. I do not remember that he said he would not register. I did not hear him tell any man "You must not register" or "should not register." He said he would rather go to jail than shoot down his fellow men, his brother men. The only thing he spoke of on the socialists was on the convention at St. Louis. He did not speak on resolutions that were adopted at that convention or tell any of it. He did not produce anything that he read from that I saw.

137 Thereupon the Government, further to maintain the issues upon its part, called as a witness on its behalf, WILBUR D. BACON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Wilbur D. Bacon. I live at 1579 Rosewood Avenue, Lakewood. I am in the service of the United States. In the month of May, 1917, I was in the newspaper business, employed on the Cleveland Leader. Since then I have enlisted.

Q. Were you present at a meeting some time in May at which Ruthenberg and Wagenknecht were present?

A. Yes sir.

Q. Do you recall the time of that meeting, the date?

A. It was on or about the 13th day of May.

Mr. Sharts: I object to any further examination on that line.

The Court: What have you to say?

Mr. Wertz: I want to inquire about this resolution.

(Referring to Government's Ex. No. 1.)

Mr. Sharts: I will interpose my objection to the introduction of any such leaflet unless it be first established that it was used after the enactment of the law.

The Court: I will say to the jury, and I will say to them now, that no conviction of these defendants or either one of them can be predicated upon any act which was done and performed
138 by the defendants prior to the 18th of May, 1917, but it is in evidence here from one of the witnesses who has testified that after the 18th day of May 1917 some one or the other of these speakers referred to the action taken by the local organization of the party that they were undertaking to represent and proclaimed in a way what that action had been, and you will recall the other testimony, which seems to me makes this evidence competent, if for no other reason than as bearing upon the motive and intent and as characterizing the conduct and attitude of these three defendants on the 20th and 27th of May. I am not undertaking to say what its weight would be. The competency of this witness to testify with respect to any resolution or any action taken or that would bind either of these defendants as participants in the adoption of it or assent thereto has not been disclosed, but this statement will indicate in a general way what my ruling will be as questions arise, so that you may take your exceptions now or interpose them from time to time.

Mr. Sharts: I will take our exception now to the ruling of the court, and, if your Honor please, I would like to call your attention further, for the protection of the defendants in this matter, to the fact that we are, I believe, limited strictly to what was brought to the attention of Mr. Schue. Any activities by the association, either before or after May 18th, if those activities were not brought to the attention of Mr. Schue, cannot be introduced in this case.

139 The Court: I concur entirely in that position. I shall rule and charge in accordance with it, but the testimony here as to what was said and done by these defendants on the 20th and 27th of May in the presence of Mr. Schue makes competent, if it should appear that these defendants were participants in the adoption of any resolution of this character, the evidence of the fact as characterizing their motive and intent and as bearing upon the primary charge here as to whether they aided and counselled Schue wilfully and as to the intent with which their acts were done and performed which have been testified to. That will be the line of ruling. You may have your exception.

Mr. Sharts: I will take my exception to that and ask Your Honor whether it is necessary to raise the question now as to the form of this resolution in the leaflet as it is offered here?

The Court: We will see about that when we get to it. He has not proved any resolution was adopted and he has not proved the contents of it nor that these defendants were involved in it. I will rule on your objections as we progress.

Q. Do you recall who presided over the meeting?
A. Mr. C. E. Ruthenberg presided.
Q. Is that the gentleman sitting at the table here?

(Indicating defendant Ruthenberg.)

A. It is.

Mr. Sharts: Enter an exception.
The Court: The objection will be overruled.

Q. Did you see Mr. Wagenknecht at that meeting?
140 A. Yes, sir.

Mr. Sharts: Enter our objection, and I will ask the witness to wait always until I enter the exception.
The Court: Mr. Stenographer, you will note an objection and exception to each one of these questions and answers, even though Mr. Sharts does not specially mention it, and I do not specially rule.

Q. Do you recall whether or not Mr. Baker was present?

(Objection by defendants; overruled; exception.)

A. I do not recall if he was present or not. I did not see him.
Q. Do you recall the presentation at that meeting of a resolution in regard to the registration under the Conscription Act?

(Objection by defendants; overruled; exception.)

Q. I hand you a paper marked "Government's Exhibit No. 1" and ask you to examine it and see if you recognize what that is?

(Objection by defendants; overruled; exception.)

A. That is the resolution passed at the meeting at the Socialist Hall.

Mr. Wertz: I do not know whether the Court and jury heard the answer or not.
Mr. Sharts: I object to the presenting of that clipping. There has been no connection shown between Mr. Schue and any meeting at that time, of the reading of that resolution to Mr. Schue or any definite explanation of that resolution to Mr. Schue.

The Court: I think it would perhaps be prejudicial to
141 your clients if I were to summarize the testimony, as I recall it, of Mr. Schue as to what was said by these defendants in the meetings on the 20th and 27th of May. For the purpose of bearing upon the intent with which the acts were said and done which have been testified to by Mr. Schue as having taken place in his presence and in his hearing, I will admit the copy of the resolution referred to. I will say this much, that Mr. Schue indistinctly testified that it was stated by these speakers as to what had been the attitude of the National Socialist Party in their convention at St. Louis. It was further testified by Mr. Schue that it was stated by these speakers that the local organization of the Socialist Party of which they claimed to be representatives had taken some action, but without going further you will remember the rest of the testimony bearing upon that subject. Under the circumstances, as characteriz-

ing and bearing upon the intent which it is necessary here for the government to prove, I regard the resolution as competent evidence.

Mr. Sharts: Before he introduces it I want to call Your Honor's attention further to an omission. How has he identified the resolution referred to in any particular speech that Mr. Schue heard with this particular resolution? If Your Honor please, I ask that they introduce first the resolution of the National Socialist Party that they say the speakers on May 20th in the hearing of Mr. Schue referred to and said that the Socialist Party of Cleveland had taken similar action with regard thereto. There is no evidence be-
142 fore the Court at present that this is the resolution in accordance with the resolution of the National Convention of the Socialist Party.

The Court: I will overrule your objection.

Mr. Sharts: Enter our exceptions.

The Court: I did not understand you to say where the meeting was held where this was adopted.

The Witness: The meeting was held at the Socialist headquarters, 773 Prospect Avenue, Cleveland, Ohio.

Q. In Cleveland, Ohio?
A. Yes, sir.
Q. On the 13th day of May?
A. On the 13th day of May.

The Court: The resolution which has been identified by the witness as having been passed at that time at a meeting presided over by one of the defendants and attended by another one of the defendants may be read in evidence, but this will not be regarded as evidence against Mr. Baker, whom the testimony does not yet show was then present or a party to it.

Mr. Sharts: Will the Court permit me to question the witness on a few points?

The Court: That you think goes to the competency of the testimony now offered?

Mr. Sharts: Simply as to his knowledge of how many resolutions were passed and with reference to what.

The Court: That does not go to the competency of the
143 testimony now offered. It might go to his credibility or to his memory or to other matters which are collateral but not to the competency of what is being offered. No, not for that purpose.

Mr. Sharts: Enter our exceptions.

The Court: He is the Government's witness for the present.

Q. Do you recall whether there was a platform in this hall?

(Same objection by defendants; overruled; exception.)

A. There was a platform in the hall.
Q. Where was Wagenknecht with reference to that platform?

(Same objection by defendants; overruled; exception.)

A. According to the viewpoint of the audience, he was on the right of the *right of the* platform sitting in a chair near the table.
Q. How close to the front of the platform?

(Same objection by defendants; overruled; exception.)

A. Judging off hand, I would say four feet.
Q. Was he on the platform?

(Same objection by defendants; overruled; exception.)

A. He was on the platform, as I remember it now.
Q. Ruthenberg—where was he on the platform?

(Same objection by defendants; overruled; exception.)

A. He was standing and sitting alternately in the center of the platform.
Q. Did he have the gavel?

(Same objection by defendants; overruled; exception.)

A. He had the gavel.

144 Q. Do you remember if either Wagenknecht or Ruthenberg spoke in regard to this resolution?

(Same objection by defendants; overruled; exception.)

A. They both spoke in regard to the resolution at various times.
Q. Was this the resolution that was adopted at this meeting?

(Same objection by defendants; overruled; exception.)

A. Yes, sir.

Mr. Wertz: I now offer in evidence the resolution as Government's Exhibit 1.
The Court: Read it. The defendants may have an exception.
Mr. Sharts: I will ask, if Your Honor please, that the entire handbill that he has clipped from be offered at the same time.
The Court: The Government will please comply with the request, and put the whole handbill in.
Mr. Wertz: At the request of the defendants.
The Court: The rest of the handbill goes in at the request of the defendants.

(Thereupon the handbill was read to the jury by Mr. Wertz, the part containing the resolution being marked "Government's Exhibit No. 1," and a complete copy of the handbill being marked "Government's Exhibit No. 2.")

Mr. Wagenknecht resides at 1291 Cook Avenue, Lakewood, Ohio. He is the gentleman at the end of the table, there.

145 Cross-examination.

By Mr. Sharts:

I attended a meeting on May 13th or thereabouts. It was either the 13th or the 14th. If the 13th was on a Sunday, the date is May 13th. At that time there had not been any enactment or passing of any conscription act in Washington that I know of. The act was passed by Congress May 18th, some five days after this. At the time this resolution was adopted, I believe it was understood that the registration should be enforced by the laws of the United States. It was understood by the President's message to Congress. That is my opinion of it at this time. I am not able to give any legal answer on that, because I do not know. I do not know whether at that time it had been finally determined that there was to be a penalty attached for refusing to register. At that time I do not believe it could have been possible for a man to have inferred that there was to be a voluntary registration, as at election time. It was generally understood that conscription is what it means, that it is not voluntary. On May 13th I had read the acts which were being argued in Congress. As far as I know, I do not believe there were men advocating both the voluntary method and the involuntary method. The distinct feature of the conscription act which was being fought out in Congress was involuntary conscription, and it was that involuntary act that the socialists gathered in that hall were fighting against and passed this resolution to offset. At the time when this resolution was passed, the
146 form in which registering was to be done had not been decided finally. That had not been decided until May 18th. At this meeting of May 13th, I did not receive that leaflet (referring to Government's Exhibit No. 2). I received a copy of the resolution from Mr. Ruthenberg. Mr. Ruthenberg presided at that meeting of May 13th. It was on a Sunday afternoon, if Sunday was May 13th. Mr. Wegenknecht was present. I do not remember of seeing Mr. Baker at that time.

Mr. Kavanagh: At this time we desire to offer in evidence Government's Exhibit 1, the resolution submitted, and Government's Exhibit 2, which is the complete leaflet.

The Court: Under the circumstances, for the purpose of not encumbering the record, may not a circular be substituted and the entire document marked Exhibit 2, but the record will show that all except the resolution was put in by request of the defendants after the court had ruled and they had made their exceptions to my ruling that the resolution itself was admissible in evidence.

(Recess.)

147 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, FRANKLIN H. FARASEY, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Franklin H. Farasey. My business is court stenographer, shorthand reporter. I was employed by Mr. De Woody, of the Department of Justice, to take in shorthand the speeches made in the Public Square in Cleveland on May 27, 1917. I have in my possession the original notes of the speeches which I took on that occasion. I produce those notes and turn to the speech made by Alfred Wageknecht. My notes of his speech read as follows: "We have a friend of ours here to my right, who is taking shorthand notes, evidently for the federal authorities. I hope that he will do me the great favor of underlining what I am about to say, because I want that to appear in capital type when he writes down the notes on his typewriter—not only in capital type, but in quotes and with exclamation points by the dozen after each sentence.

Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the socialist party of the United States, and, not agreeing with the official action of the socialist party of the United States, we must say that this afternoon Max Hayes does not speak for the socialist party. The socialist party has taken a very definite and decided stand upon this matter
148 of registration for conscription. The national convention of the socialist party went on record and declared that it shall be the duty of every dues-paying member of the socialist party to fight and fight and fight until there is no more left in them against conscription whenever and wherever he can. And we are going to fight. We don't intend laying down on the job at this time, just because our capitalistic government, controlled by the Rockefellers and the Morgans, say to us, "You shall do so and so." The capitalistic government has said to labor unions: "You shall do so and so" and time and again the labor unions have said, "We refuse to do so and so because it interferes with our liberties." And we say now, "We shall refuse to do that which interferes with the liberties and democratic rights of the working class." We socialists shall fight and fight until the conscription law is removed. What do you suppose we are standing on this block for every Sunday bellowing our lungs out? Do you suppose we are here just for fun or just to hear ourselves talk? We have got something to say. The socialists of this country and of this state, and of Cleveland, have laid specific plans which they intend to follow and which they are going to follow. It may be—it may be that the socialist party may seem—I say, may seem, insignificant, and an organization which to you may not seem to wield much power, but let me tell you this, friends—let me tell you this: The actions of the socialists of the world within the last several months have done more—and the publicity given to these actions by the capitalistic papers has done more—to
149 eliminate prejudice against the socialists, and to bring about peace than anything else that could happen, no matter what you thought of it—and that is true.

Why is our Government afraid of the Stockholm peace conference? Tell me. Why is it afraid of the Stockholm Socialist International Conference? We know why they have been. We claim that peace shall be brought and that the war shall end with no country the victor. That is our claim. That is, I think, where eventually the socialist party, every local, every county and every state and national organization will stand. However, that is not the position of the American capitalistic class; that is not the position of the French capitalistic class; although it is the position of the Russian working men. And why is it not the position of the American and the English and the French capitalistic class? Because they have made up their minds that German capitalism shall be—shall disappear from the earth as opposed against French, British and United States capitalism. That's the reason why.

Now, the socialists don't care a whoop in hell which capitalistic class is the most powerful in this world. All we care about is that we shall make the working class of every country the most powerful in that country. And so we lay down this principle, that no matter what you may think about us socialists, no matter what you may think about us as an insignificant political part-, we at least—understand—we are at least the only party with backbone and power and nerve and the belief in justice and democracy sufficient to come out before you and proclaim our principles irrespective of this man here who is writing the shorthand notes, irrespective of the recruiting station, irrespective of the policemen who are in the audience.

Now, there are two things you can do, friends. There are really two things you can do. There are always two alternatives for every man who lives in any democracy or under any republican form of government like this one. There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: you can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, "The time has come when we, through organized power and strength, must say to capitalists that they cannot any more curtail our rights and our freedom and our liberty."

Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, understand, in this movement for working class liberty, but then somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand. And so we are willing to-day to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription. You can either register and run a chance of being drafted, or you can refuse to register and go to jail. Now, you have the right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and

go to jail as the Government has the right to say that you shall register and go to murder.

Well, the question is, of course,—you may applaud here this afternoon—but after a bit the question will be this: how many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? A man within the age limits—any man—any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest. There are subsequent ways to protest, but this is the first place to protest.

Now, then, we are here this afternoon to explain the situation to you. What we say this afternoon is this: that every man has the right to do one of two things, and I want to repeat that. He has the right to do one of two things. He can either refuse to register
152 and run a chance of going to jail"—That is all.

Q. What happened at that point?

A. The speaker was arrested, I think.

Q. What is that?

A. The speaker was arrested. At any rate, he stopped talking.

Q. Did you go with him or with Mr. De Woody to the county jail?

A. Yes, but I haven't those notes.

Q. I will hand you a transcript here and ask you whether you made that transcript from the original notes and whether or not it is a correct transcript?

A. Yes, all of that, and I read that over.

Q. I will ask you to read the conversation that took place between Mr. Wagenknecht, Mr. De Woody and yourself and Mr. Lind at the police station, following his arrest?

Mr. Sharts: If your Honor please, I want to enter my objection at this time. Mr. Schue is charged as the principal who refused to register, and the statements that have been made here by the reading of those notes are the only statements that were made or that could possibly have been made in the hearing of Mr. Schue. Any further statements cannot be added on top of and in addition to what has been presented as a complete record of the statements made by Mr. Wagenknecht.

The Court: You do not object to the use of the transcript because he has not produced the notes here from which he says he has transcribed it?

Mr. Sharts: I understood he was reading from his original
153 notes on the first.

The Court: He did on the first. Now, on the conversation at the jail, he says that he does not have his original notes here but

he has the transcript of them which he himself made and says it is a correct transcript. If you insist that he shall send for his original notes and have them here for your examination, if you wish to examine them before he reads the transcript or reads from it, I would rule you are entitled to that.

Mr. Sharts: I ask that privilege, because I have some knowledge of shorthand myself.

The Court: Do you know where your notes are?

The Witness: This was taken at the police station on the back of other sheets. I think I can gather them all together. I am not dead certain that I can, but I believe that I can.

The Court: Where is your office?

The Witness: In the Engineers Building.

Mr. Wertz: We will pass that until we can get those notes.

Q. Following the arrest of Wagenknecht, I will ask you if you took down the speech of C. E. Ruthenberg?

A. Yes, sir.

Q. Will you turn to your notes and read that speech?

Mr. Sharts: Are these the original notes?

The Witness: Yes, sir, and the first speech also.

(Witness reads from notes:)

154 Comrades and friends: it is our purpose and our duty to remain here at this meeting and continue our protest against a violation of the democracy which the government of this country says it is fighting for. What has happened here this afternoon is the thing that has happened so often in Russia until the Russian working class took—I could not get the exact couple of words. There was too much applause.

The Court: There was applause at that point, then?

The Witness: Yes, sir.

The Court: Proceed.

A. (Continuing.) The socialist party in the United States and in the city of Cleveland is ready to uphold democracy at the expense of sending every one of its members to jail. Now, I am going to present to you, just as I intended to present to you before this interruption took place, our ideas and position in regard to the war and in regard to conscription.

The President of the United States, in January of this year, appeared before the Congress of the United States and delivered a speech in reference to bringing about peace. In that speech before the Senate of the United States he advocated bringing about the end of the war without victory for any nation. Immediately the news spread across the Atlantic to the nations of Europe that the President of the United States had demanded peace without victory for any nation, and the forces of democracy in Europe began to en-
155 dorse the position taken in that speech. The socialists of France went on record as favoring that position. The socialists of Great Britain, the minority party in Germany, the socialists of Austria and the socialists of Italy, and finally came the Russian

revolution, and the entire Russian people, through their committee went on record in favor of that program.

And then these working class organizations began to agitate, began to work for a peace movement to realize these terms of peace. The socialists International called a conference at Stockholm. It was initiated not as the lying, prostituted newspapers of Cleveland have said—it was initiated not by German influences, but by the Russian, the Swedish, and the Belgian socialists, Belgium, that Vanderbilt represents as Minister of Munitions, endorsed this position, as have the socialists in most of the countries represented by the allies in this war. And mark this. This is my point. This is the answer to that appeal which is being made to the young men of this nation to go out and fight for democracy. When the socialists of the United States asked for passports for its representatives to attend the conference, endeavoring to bring about peace on the terms annunciated by the President of the United States before this country declared war, this democratic country, so-called, refused to permit the representatives of the American socialists to attend that conference. If that is democracy, then Russia before the revolution was a democracy.

156 To-day the President of the United States stands in the position of having offered terms of peace, having offered terms on which to bring about the end of the horror, the bloodshed, the suffering, the misery of Europe, the horror, the suffering, the misery into — the men of this nation are about to be plunged—having offered terms on which to bring about the end of this condition, and then refusing to permit—for the President is responsible for the action of the State Department—and then refusing to permit free men to leave this country to work for those terms—to work for peace.

Now, my friends and comrades, what is the reason the Government of this country does not desire the peace conference at Stockholm to be successful? Why doesn't he wish the working class, the working class representatives from every nation in Europe, to gather together to bring about mutual terms of peace through which they can save the working class from more misery, more suffering, more bloodshed, more killing and members of the working class?

The answer is that terms—peace brought about on those terms at the present time would not serve the interests of the capitalistic class of this country, in whose interest the war was declared and is to be fought. It is for that reason alone that the government of this nation does not want these socialists to be represented in the Stockholm conference or peace broughtt about through the efforts of the

157 working class. The capitalists class is not fighting a war for democracy. The United States is not fighting a war for democracy. It is fighting a war for commercial imperialism and the profits of the capitalist class of this country.

Now, then, if this be true, if the appeal for democracy be one of those lying statements which are always put out by the ruling class in every nation in order to trick the workers into serving their interests and offering their lives in their interests, what shall be the position of the working class of this country in regard to this war?

We have been told this afternoon that we are an insignificant minority. It may be true that the socialists' political organization in this country is still a minority, but in this matter it represents the wishes and will of the majority of the people of this country.

If there need be—if there need be any proof of that position, we need only to look at the audience which is assembled here and which has stood here in this spot Sunday after Sunday to hear the socialists denounce the government and its action in this war. We need only to look at it to secure the opinion of the workers of this city generally. We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the
158 Billy Sunday form of revivalism to induce you to register for conscription. They are afraid. They are afraid that the working class of this community may on registration day enact their own referendum in regard to this law by refusing to register. (Loud applause.) What is our action to be?

My voice is strong enough, I think, comrades and friends—my voice is strong to spread over this audience, I believe, in spite of the fact that we are to be assisted in gathering a bigger audience.

There was a fife and drum corps playing there.

Q. Does it show what the fife and drum corps was doing?

The Court: Your notes do not show anything on that subject, do they?

The Witness: Yes, I have here——

The Court: What do your notes show?

The Witness: Fife and drum corps.

The Court: Proceed.

A. (Continuing:) What is to be the position of the working class of this nation in regard to war and registration for conscription? Are we in this country, having been bludgeoned—no other word described it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the Presi-
159 dent and Congress was elected—are we to meekly submit and lie down and permit the ruling class to do evil, base, dirty work?

Have ever in the history of the world—have ever the rights, the liberty, and the freedom of a people been preserved by cowards who refuse to carry on the struggle in the face of danger? And we of the socialist party say to you that never in the history of the world have a people maintained its liberties, maintained its freedom, in the face of aggression, in the face of attempts to place democracy in the saddle by accepting the will of the ruling class.

It was difficult to take it because we were in the crowd and often times I would be elbowed accidentally and sometimes I would have the book up or down. That is why I have not got the word there (indicating to Mr. Sharts).

Friends, the only way we can maintain our freedom—the only way we can maintain our liberties in this country, is by continually agitating and working, rousing up the people to a sense of what is being done by their government; and, when the time comes, sweep

that government out of power and to elect the representatives of the working class to office to undo the evil work that has been done by those who are in power.

Now, my friends, for the benefit of the authorities in this
160 audience, and for the benefit of those who may be ignorant of the fact, I want to say that the first amendment to the Constitution of the United States, which is being rode over rough shod to-day here in this audience by the police authorities and the men whom they represent—the first amendment says that the right of the people to free assemblage——

Mr. Sharts: Let me ask, whenever you have in your notes the word "applause", would you please announce that? Re-d your notes as you have them there, not picking out just the speech?

The Court: Of course, the applause is not a part of Mr. Ruthenberg's speech, but if you request that he read it, he may do so.

Mr. Sharts: I want his complete notation read in.

The Court: All right.

A. (Continuing:) My friends, the only way we can maintain our freedom—the only way we can maintain our liberties in this country, is by continually agitating and working, arousing up the people to a sense of what is being done by their government: and, when the time comes, sweep that government out of power. (Applause.) And to elect the representatives of the working class to office to undo the evil work which has been done by those who are in power. (Applause.)

Now, my friends, for the benefit of the authorities in this audience,
and for the benefit of those who may be ignorant of the fact,
161 I want to say that the first amendment to the Constitution of the United States, which is being rode over rough-shod to-day here in this audience by the police authorities and the men whom they represent—the first amendment says that the right of the people to free assemblage and to petition Congress through meetings of this kind shall never be abridged. That's what the document which underlies the institutions of this country says in regard to this matter, and we intend to avail ourselves, in the face of any power that may be brought against us, of this right to uphold freedom, to fight for freedom, through arousing the people of this nation to a realization of the things that they are facing.

And, further, we of the socialist party have taken a certain definite position in regard to conscription. We have taken this position, that the thirteenth amendment to the Constitution of the United States forbids involuntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that we people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law. (Applause.) And
so the socialist party of the city of Cleveland by resolution has
162 gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an

individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow human beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the socialist party that we urge and recommend that they refuse to be registered for conscription.

I say to you here this afternoon, as I said at the first meeting which I addressed on the Public Square after was was declared—at the first meeting, at a meeting, at a time when the ages in the conscription law had not been fixed, I said to you then, when I personally was in danger of conscription, that if I came between the ages provided for in that law, that I would refuse to register for conscription. (Applause.)

My friends, I am ready to say more: that if this law is amended, that if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the millions against the socialists on the battlefields of Europe, if, after a first million or two of the flower of the humanity of this country has become the victims of the ruling class in their insensate
163 greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends its law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted. Further, that if the time comes that I am asked to go into the army, if my name were registered by force and the government drafted me, believing, as I do, in humanity and being opposed to killing my fellow human beings—opposed to the wholesale murder which is going on in Europe—then I say that the ruling class and government of this nation will find that they will have to stand me against a stone wall before they can bring me into the army to fight their battles.

I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made. I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder. I would be saying little to you if I left you only this message. If I only told you that we socialists do not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete. What are we to do? What are we to do? What have we the power to do? My friends, let me say first and foremost that the one thing that we must not do in this crisis—we of the working class
164 must not resort to any kind of force. We of the working class must not resort to any kind of violence. For us that would be suicide. Let us stand for the principles which we favor. Let us go from rostrum to rostrum, from meeting to meeting, to spread broadcast this message which we have been spreading here this afternoon. Let us preach this doctrine to all of the workers of this city. Let us insist upon our rights of free speech to the extent of our going to jail. Let us willingly and gladly go to jail rather than to the trenches, but let us never resist by force.

State what you have to say, and let the ruling class do its worst, for, remember, you have the power in this nation, you have the strength in this nation. When the time comes to do so, thrust those who are trying to enslave you out of office and yourself take control of the powers of government. Let us until that time abide peacefully, keeping on our agitation, never fearing the result of speaking the truth, for we have the right to speak the truth, but no violence and no force.

Remember, my friends, I tell you here so that you may spread the news around. Your first opportunity will come in the city of Cleveland on November 6th when you go to the ballot box. You have the power there to elect socialist candidates and make this a free city for the working class.

165 I assure you that the socialist party will continue these meetings as long as there are men who are able to talk. Next Sunday afternoon at 2:30 we invite you to bring an audience three times as large as this. That's all the place will hold. Come over to Market Square at Lorain and 25th and we will again present to you the facts of the betrayal of the people of this country by its servants in declaring war and placing a conscription law on the statute books.

My friends, if the Wilson administration had, before the November election of last year, said to the people of this country that "Next May we will enact a law by which we will be able to take the young men of this country out of their homes, by which we will be able to take those who are to be the stamina, the backbone, of our civilization in a few years and send them out to fight for the billion dollars which Mr. Morgan and his fellow capitalists have foolishly invested in the European war, by taking a gambler's chance and backing the allies to win—" if President Wilson and his supporters had said that before the November election, the President and the Congress that favored such a measure would have been buried under such an avalanche of votes that he would have been the worst beaten president in the history of this nation. (Applause.)

If the President and Congress, having enacted a law which even all the appeals, all the urging, all the calls to duty, all the
166 appeals in favor of a sham national patriotism which the newspapers have been able to bring to bear—if all of this has not been able to induce the American people to support this law, then it is not the socialists who are opposing this law who are traitors to this nation, if this is a democratic nation—it is not the socialists who are unpatriotic—it is not the socialists who do not stand for democracy—but it is the government and the President who put the law on the statute books that deserves the utmost condemnation of every free-thinking man and woman of this country.

Let me go a step further in the duty of the hour, in the thing that we as workers must do to carry on this fight to a successful conclusion. Our power as an organized mass—our power as an unorganized mass, I should say, as individuals, does not amount to a great deal, but if the five thousand or more men and women who are within the reach of my voice organize their power, then, before

the election day comes, they can sweep this city and establish real democracy through a working class government. The socialist party gives you the opportunity to do this work. It is ready to be the nucleus around which the men and women who are inspired by the ideal of freedom, the ideal of democracy, the ideal of liberty,
can gather—around which they can knit together their power
167 and win this victory.

And so we ask those of you who are in attendance, we ask those of you who are in this fight, to join the organized socialist movement in the city of Cleveland, so that together we may end Czarism and autocracy in the city of Cleveland and the nation as well. And this is the way to do it. Here are application cards for membership in the socialist party. It is a card which every man and woman—pass them around, comrades. Just a minute and I will continue—a card which every man and woman who joins the socialist party signs. It reads as follows: this is the pledge for working class people——

I started to take that and did not finish.

The Court: That is all you took?

The Witness: No, I took more.

Mr. Sharts: Read what you took.

The Witness: I scratched some of it out and do not know whether I can make it out.

The Court: Read what you have.

A. (Continuing:) Sign that and become a dues-paying member of the organization of this city. They are banded together to carry on this fight. The dues are 25 cents per month. If you join us, you add your strength, you add your ability to carry on this fight and bring it to a successful issue. That is the work that is now
the most important for the working class of this community,
168 to organize and sweep the present capitalist system with its autocracy, with its political Czars, with its abolition of free speech, with its refusal to abide by the Constitution of the United States—sweep this out of existence at the ballot box, and establish a working class movement—a working class government as Russia has already done.

For the benefit of the ruling class of the city of Cleveland, I am here to say this afternoon that when the workers of Russia learn of the action of the government of this country in refusing passports to Morris Hillquist, Victor Berger and Algernon Lee as delegates to the International socialist conference.

(Referring to place on witness' notes.) The reason that is scratched out is this: some times I could not hear the speaker distinctly and after I got a few words more I saw I must have misunderstood him and scratched it out. The next I have here is:

They will assemble before the American embassy and demonstrate against autocracy as they did when they heard that the capitalist class of this country intended to murder Mooney in San Francisco. I again say that if word could be sent through the censorship, through the lines which to-day are the means of communication with Russia, that this afternoon in the city of Cleveland a socialist was arrested

for speaking to the public in support of peace and against
169 conscription, that those Russian workers would sen*t* Mr. Root back to America quicker than he went. (Loud applause.) For the socialists do not stand for a false democracy. The working class of Europe does not prate about democracy and then use autocracy to prevent free speech and free assemblage. The socialist party stands for the right of every man to fully and freely express his views, for the right which the Constitution of this country says the people of this country have, and for the further right which the Declaration of Independence says is the right of every people, when any government does not conserve life, and liberty and happiness, it is the right of the people to alter and change such government. (Applause.)

The socialist party believes that a government which is elected on a mandate of "He kept us out of war" and then declares war, a government which, in defiance of the Constitution (applause), and——

(Mr. Sharts refers to a place in the witness' notes.) The part Mr. Sharts is referring to is right here "it is the right of the people to alter and change such government" (applause), and then the next I have is "The socialist party," and I have a couple of words there scratched out at the time I took them. I don't know what they were.

The Court: You cannot remember what it is?

The Witness: I cannot read it. It is scratched out.

170 A. (Continuing:) The socialist party believes that a government which is elected on a mandate of "He kept us out of war" (applause) and then declared war, a govern- which, in defiance of the Constitution and in defiance of the historical liberties of this people, puts a conscription law on the statute books—that it is the duty of the people to organize their political power to alter and change that government. And that is what we propose, if every socialist in Cleveland has to serve a term in jail as the price of doing it.

My friends, I have talked down the band and I have talked down the fife and drum, and so, as a closing word to you, go forth in the city of Cleveland and spread the word, spread the news of what has happened here this afternoon. Spread the message of socialism. Let it ring forth in every nook and corner of this community. Let every working man and woman hear this message, and then all of you—all of you who believe in freedom and democracy come to the mass meeting next Sunday on Market Square, Lorain and West 25th, and let us show the government and the autocrats where the people of the city of Cleveland stand in this matter. I thank you.

Mr. Wertz: Mr. Sharts insists on the original notes as to the other matter.

The Court: How long will it take to get your notes?

171 The Witness: It will take me five minutes to get over there and it may take me five or ten minutes, maybe a little more than that, to get them.

Mr. Wertz: We have one more witness to put on for a few questions——

The Court: You can get your notes?

The Witness: I am not dead certain that I can get them.

The Court: I am not of the opinion that your transcript is not competent even without your notes, but the objection has been made, and you will find if the notes are in existence and, if they are, produce them.

72 The fife and drum corps were at the recruiting station on the Square. The old soldiers were gathered there and were playing at the same time this socialist meeting was going on. That is the socialist meeting was started, and they were part way through before I first heard the fife and drum corps playing. They were playing "The Star Spangled Banner."

(The witness was excused to go to his office and get his shorthand notes covering the conversation at the police station and another witness was called.)

73 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, CHARLES DE WOODY, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Charles De Woody and I am Special Agent of the Department of Justice. As a part of my duties, I caused the minutes of a meeting on the 27th of May to be taken down in shorthand by Franklin Farasey. I was present at that meeting. I have been here in the court room and heard these speeches read. The portion of it that I heard was correct, according to my recollection. I was not there on the 20th of May.

(No cross examination.)

74 Thereupon the witness, FRANKLIN H. FARASEY, resumed the witness stand and further testified as follows:

Mr. Sharts: If I have failed to do so, I want to interpose my objection at this time to the introduction of that evidence. I think I have already stated the grounds.

The Court: Yes. I will give the jury an instruction before it goes in, but your objection to its introduction as a whole will be overruled. There may be individual parts of it that may raise a separate ground than those you have stated.

(To the Jury) Gentlemen of the Jury: As I am advised, the testimony which it is now proposed to offer and which the Court will permit to be introduced in part, if not in whole, relates to a transaction in which Mr. Wagenknecht only was a party and present at the time it transpired. I am charging you that that evidence is not to be received and weighed by you for any purpose against the de-

fendants Baker and Ruthenberg, that it is to be received and weighed by you as against Wagenknecht only as baring upon his intent and motive in the remarks and conduct which the evidence may tend to provide that he indulged in or entered upon on the 27th of May in the presence, as the evidence tends to prove, of Mr. Schue.

175 I have been able in part to find my notes which I took of the conversation that Mr. Lind and Mr. De Woody had with Mr. Wagenknecht at the jail. At the time I prepared this transcript I had the complete notes. As to the reason I cannot find the complete notes now, in the first place, it was not a full transcript of all that was said. I was in the Police Station and there had been quite a bit of talk there and Mr. De Woody turned to me and said: "I wish you would take it down" in an undertone, and I had a folded newspaper, and I took quite a bit on the newspaper, and I think I had a letter in my pocket, and I took some of it on that, and Mr. Wagenknecht turned around and said something about taking the notes, and then I sat down and took them on these papers.

The Court: What part of it is it that you do not have your original notes for—the part you took on the newspaper and on the letter?

The Witness: Yes sir.

The Court: Have you made diligent search to find such parts?

The Witness: Yes, sir.

The Court: With what result?

The Witness: I have not been able to find that part.

The Court: What has become of that part of your notes?

The Witness: I cannot tell you.

176 The Court: Have you searched in every place where they probably would be?

The Witness: Hastily, yes.

The Court: Have you any reason to believe that a further search would produce them?

The Witness: No, I have not.

The Court: Did you make a transcript of them before you lost or destroyed part of your notes?

The Witness: Yes sir.

The Court: Were those notes correctly taken at the time?

The Witness: Yes sir, to the best of my ability.

The Court: What as to the transcript that was made from that part of your notes which are missing—was that correctly made?

The Witness: That was correctly made.

The Court: Have you seen the transcript?

The Witness: Yes sir.

The Court: How long after the incident was it that you made the transcript?

The Witness: I just had time to have supper, about an hour or an hour and a half.

The Court: With that preliminary examination, I will rule that he may use such part of his notes that he has here and the transcript made under those circumstances for the part of it as to which he cannot produce his notes.

Mr. Sharts: Enter our exception.

Mr. Wertz: I would like you to read pages 7, 8, and 9, marked in this transcript.

177 The Court: The question is as to whether there was said at that time and place things that are shown in that transcript.

A. 7, 8 and 9?

Q. Yes, down to the blue mark.

Mr. Sharts: Before you read, let me ask, is this the part you had no notes for?

The Witness: I will tell you in a minute. The first I have notes of is, "Mr. Lind."

Mr. Sharts: I want to enter an exception to his reading from his transcript any part that he does have his original notes for.

Mr. Wertz: That is about the fourth or fifth page.

The Witness: (Reads.)

"Mr. Lind: How long have you been in Cleveland?

"Mr. Wagenknecht: In Cleveland? You mean live here or lately been here?"

Q. Where did this conversation take place?

A. In the police station.

Q. When?

A. The same day that the speech was made in the Square. I think that was on May 27th.

Q. Who was present?

A. Chief of Police Rowe, Inspector Smith.

Q. Mr. De Woody?

A. Mr. De Woody, I think Captain Martinec, and myself.

Q. Which one of the defendants?

178 A. Mr. Wagenknecht was the only one in the room at that time.

Q. Now, go ahead and read what you have.

A. (Reads.)

"Mr. Lind: How long have you been in Cleveland.

Mr. Wagenknecht: In Cleveland? You mean live here or lately been here?

Mr. Lind: Lived here.

Mr. Wagenknecht: Well, I have lived here for twenty years, I went out west and then came back here. Do you want to know the whole time, or just the latter part of my stay?

Mr. Lind: Yes.

Mr. Wagenknecht: Well, I've been in Cleveland since 1917, 1913, I believe.

Mr. Lind: Four years?

Mr. Wagenknecht: Yes.

Mr. Lind: You are a citizen, of course?

Mr. Wagenknecht: Sure.

Mr. De Woody: Where do you vote, Mr. Wagenknecht?

Mr. Wagenknecht: Well, I voted in Lakewood.

Mr. De Woody: Is that your residence, 1291 Cook Avenue?

Mr. Wagenknecht: Yes.

Mr. De Woody: Who lives there with you? Your family?
Mr. Wagenknecht: Yes.
Mr. Lind: This fellow, what's his name, here, kind of upset the dope, didn't he?
Mr. Wagenknecht: Hayes?
Mr. Lind: Yes.
179 Mr. Wagenknecht: Well, he has been a litle away from the Party activities, and he didn't understand the Party. He has taken the same stand that the labor unions generally have taken.
Mr. Lind: Well, he, in other words, doesn't believe that the right of free speech goes as far as you do. He evidently doesn't believe in advocating the violation of the law, and that's where he differs from you.
Mr. Wagenknecht: Yes.
Mr. Lind: You advised them over there this afternoon that there was two things they could do, either register and go to war or else refuse to register and go to jail? You said that over there, didn't you?
Mr. Wagenknecht: Now, I'm not saying if I said that at all. You heard what I said.
Mr. Lind: Well, I am just asking you.
Mr. Wagenknecht: Well, I am not answering.
Mr. De Woody: Where were you born?
Mr. Wagenknecht: I was born in Germany.
Mr. De Woody: Germany?
Mr. Wagenknecht: Yes.
Mr. De Woody: How long did you live in Germany?
Mr. Wagenknecht: A year and a quarter or a year and a half, something like that.
Mr. De Woody: And were you then brought to the United States?
Mr. Wagenknecht: Yes, I was brought to the United States.
180 What is your name?
Mr. De Woody: De Woody is my name.
Mr. Wagenknecht: I am glad to meet you. You were taking short hand notes this afternoon?
Mr. Lind: No, this is the man you were referring to.
Mr. Wagenknecht: Well what's the charge?
Mr. Lind: What's the charge against you?
Mr. Wagenknecht: Yes."
Mr. Wertz: I think that is all we care for.

Cross-examination.

By Mr. Sharts:

All of the things that I have read are some of the notes that I took on that newspaper and on that back of an envelope, unless it would be that there is another sheet I do not find. I do not know what charge was preferred against Mr. Wagenknecht at the police station at the time he was arrested, or if there was any at all.

I used the Success system of shorthand. It is based on the Ben Pitman system. It follows the old Ben Pitman system of positions

above, on and below the line. If a mark is above the line, it represents a certain vowel, if it is on the line, it represents another vowel, and if it is below the line, it represents still a third vowel. If the mark is made above the line, it may me "ah," if it is on the line "oh" if it is under the line "uh." In order to take this system properly, you should have ruled lines. That is the ideal way to take it. However, it is not necessary. When you do not have lined paper,
181 you would find your position by the word immediately preceding. That is, you would throw your next mark a little higher up, if you wished to indicate the first position, and, if you wished to change the vowel a little below. That is the method by which I indicate the vowel sounds, and read the notes afterwards. If it is above that imaginary line, it means one vowel to me, and if it is below, it means another.

I recall the speech of Mr. Wagenknecht that I took. I will give you the reason, if you wish. It is because he referred to me so particularly and there was a large crowd, a tremendous crowd. We got there, in the first place, very late, and we had to elbow our way through the crowd, and we seemed to be the subject of interest of most everybody there, and I think I recall everything that happened or occurred there. After he called attention to me and drew the eyes of the crowd upon me, I certainly was struck with that particular part of his remarks. He did not embarrass me or put me in an embarrassing position. I would call it rather conspicuous, more conspicuous than I like to be. I mean there were lots of other places I would rather have been right at that time than right there.

We stood to east and south of the speaker, I would say from ten to fifteen feet. Maybe it is twenty and maybe it is eighteen. This occurred in the Public Square. Mr. Wagenknecht was speaking from the rostrum, that is, about the southerly end of the American Trust Building. If the southerly side of the American Trust
182 Building were to be projected out, I think it would be about on that line, and also about on a line with the westerly part of the recruiting station, if that were to be projected. With reference to the Tom Johnson statue down there, the statue was with its back to us. I cannot tell you of my own knowledge how much of a crowd was there. I saw the crowd in going in, not after that. I would say there were probably 3000 people there. I may be away off on that. They stretched out about just up to the sidewalk. I think the sidewalk was clear. I think the rostrum is about five or six feet in from the sidewalk. The crowd was all in front, and either side of the platform.

I took down Mr. Hayes' remarks in part, not all. When I was taking down Mr. Wagenknecht's remarks, he was standing on the rostrum and facing in toward Tom Johnson's Statue. If anything, I was slightly to the platform's right, but almost directly in front of him. I went with Mr. De Woody. We stood in front of the Marshall Building, and later on I looked up and saw Mr. Lind, and also there were a couple of police officers there. I am sure this was the meeting of May 27th. After Mr. Hayes had finished speaking, the next speaker followed him immediately. My memory is that he was

introduced by the chairman of the meeting, who Mr. Wagenknecht said was Mr. Hitchcock. Mr. Hitchcock didn't talk for any time.

When Mr. Wagenknecht began to talk he faced about in the direction of the Tom Johnson Statute. The crowd extended
183 in front, and on his left hand and on his right hand. As he talked, he did not talk entirely in one direction. He would just turn slightly to either side. He would throw his voice in that direction for a while and then in this direction (indicating). He spoke, I would say, 99 per cent of his words almost directly in front of him. This crowd was all around. I was packed in there very tight. The crowd was demonstrative during the time I was taking the notes of Mr. Wagenknecht's speech. They were applauding. I omitted to read the applause notes as I was giving Mr. Wagenknecht's speech. I have those notes. Upon examining the notes I find he was interrupted by applause eight times. I cannot tell you how long he spoke. As just a rough guess, I would say from ten to fifteen minutes. I would not say he was interrupted with the applause. The applause would come when he would pause himself at the end of a sentence or at a stopping place. I cannot say that he ever was really interrupted, but possibly once, when his voice was drowned out by applause. He may have been talking at other times when the applause was going on, but I think it was more often that the speaker reach a stopping place and then the applause would follow.

I got my first training in shorthand at the Spencerian School here in Cleveland. I think it was the year 1910. I was twenty years old then. I am now almost 27. I spent a year at the Spencerian, and then I studied by correspondence through the Success School for another year. That was two years. At that time I was with
184 the Secretary of State. Then I quit my position with the Secretary of State and went to Chicago and finished there at Chicago at the Success School. That is the third year. I began taking shorthand of speeches five years ago. It is very seldom I reported speeches before I started to work as a court stenographer. I did, however, report President Wilson's speech, and I reported various speeches for the Constitutional Convention of Ohio for my own self and for friends of mine and for practice. I think I reported most of them for the Secretary of State of Ohio. I have been engaged in the work of shorthand steadily ever since. I have worked at shorthand for seven years. About five years ago I started reporting. In this county we have no official stenographers, so that I cannot say that I have ever held a position of court stenographer. In Cuyahoga County each stenographer operates in a similar fashion to attorneys; that is, he maintains his own office and his own office force and is employed directly by the attorneys and paid by their clients, not by the court or the county or the city. I have been doing court room work for five years, exclusively here in Cuyahoga County, in all courts except this one. I am not working for any one right at this minute. I have done quite a little work for the Coach Detective Agency. I think I have done work for possibly five or six different detective agencies in different parts of the country.

My attention was first called to the job of reporting these men when I got home on the Saturday night before that. There
185 was a call there that my mother had left for me, on the telephone, and I called up that number, and it was Mr. De Woody, and he asked me what I was going to do the next day and if I would report these speeches for the Department of Justice. I had met Mr. DeWoody before, but had not done work for him before. He never made any previous arrangements with me. When I went to work to report this meeting, I arrived at Marshall's at about a quarter to two, and when I started to take the speeches, it was almost an hour later. I am not certain about that. At that time there was a large crowd and I had to work my way through the crowd. When I started to take notes, I did not have anything to rest my book on. I just stood there with a book in one hand and worked that way. At first people were pressing against me, I do not think at any time that I had to ask anyone what the speaker said. I do remember that at one time during the speeches, I turned around to Mr. DeWoody, I think, and asked him what the speaker said, and he said he did not get it. My recollection is that the crowd started to applaud before the speaker had finished his sentence and I did not hear it that time. I have given a literal rendering of Mr. Wagenknecht's speech as I heard it. There is nothing in my notes to indicate the place where I could not hear what he was saying. My recollection is that I just omitted the place where I did not hear.

I also reported the speech of Mr. Ruthenberg. There are a number of places in my notes where I have drawn a line through parts of the notes that I started to take. That was because of the par-
186 ticularly poor quality of that note that was scratched out. Then I would have to go back and write it over. In the meantime Mr. Ruthenberg was talking right along, but he is a very slow talker. I consider that he is exceptionally slow. I could go back and be writing down what he said and then go and catch up with what he was going on with. Sometimes you will think you understand just what the speaker said and a second later you will find that you did not quite understand it. There are a great number of these through my notes, erasures and then putting something else there. It runs through the notes of all of the speakers, because I was standing up like this (indicating) and working with the arm free, no support for my hand, and in the midst of a large crowd, which was continually bumping me in the front and in the back, and I was writing part of the time with a steel pen and part of the time with a fountain pen, and part of the time I got my book up like this (indicating) and the ink would not flow up the pen, and then I would have to stoop over again until I would get it to flow back again, and then back up again, until I could write better. I was doing that continually during these two speeches. I think at one time I rested my book on Mr. DeWoody. I got along fine until he moved over or something. I will say that those notes are just as I heard the men speak, and just as I put them down.

When I went to the police station I was carrying my note book in my hand, I think. At the police station there was present the

Chief of Police, Inspector Smith, Mr. DeWoody and Mr.
187 Lind. I don't know as there was anyone else. It is my recollection there was no other officer sitting there, but I will not say that for sure. The room in the police station in which I went was the second room away from the Chief's private office. All of these men were not in there surrounding Wagenknecht. Mr. Wagenknecht was standing. Mr. Lind was sitting at a desk. The others were walking around the room, or sitting down. Mr. De Woody asked him some question, and also Mr. Lind. One would ask him and then another would ask him and so on. My notes show that. When I came in, I think I sat down. I think I was there before Mr. Wagenknecht came in, that is, in the room before he came in that room. After the arrest I remained to take Mr. Ruthenberg's speech before I went down to the station. I do not think the Chief of Police asked any question. I have no recollection that Inspector Smith asked any. When I was taking notes on the newspaper I had it in my hand rolled up and was writing along the margin of the paper, holding it in one hand. There were no lines on it at all. When I had exhausted that margin, I pulled out an envelope and just used the back of that. There were no lines on the envelope. I just held it in my hand. I do not think it was a stiff envelope. I think it was just a plain ordinary envelope. I completely used that up. By that time I discovered Mr. Wagenknecht knew I was taking notes and I no longer made any concealment of it.

There were times when I was taking the speeches when
188 the ink would refuse to flow from my pen and at those times I had to bend over and then it immediately began to flow. I did not have any delay when it failed to flow. I never had an experience of that kind before. I was working under very unusual difficulties, the most difficult I have ever experienced.

Mr. Wertz: We rest.

The Court: The general denial tendered by the District Attorney this afternoon I will permit to be filed in accordance with the leave that was asked and given yesterday, Mr. Sharts. I have had the stenographer transcribe what occurred. You may have an exception.

Mr. Sharts: Our exceptions are in.

(Adjournment to July 20, 1917, 9:00 A. M.)

189 (July 20, 1917—9:00 A. M.)

Mr. Wertz: The Government rests.

Mr. Sharts: If your Honor please, I wish at this time to make a motion to have the Court take the case from the jury and instruct a verdict for the defense upon the ground that the Government has failed to establish all of the essential facts of the indictment. I base my contention chiefly upon this fact: it is an established rule of evidence that the uncorroborated testimony of an accomplice is not sufficient to convict. In this case we have had an abundance of tes-

timony regarding speeches that were made. We have had abundant testimony of a leaflet that was circulated prior to the passing of this Act. There has been abundant testimony along these lines, but, when it comes to the specific offense charged in the indictment, that these men aided, abetted, counseled, and procured Mr. Schue to fail to register, we have absolutely nothing to support his statement, either that he was there, or that he was influenced. He says he was there. He has given a few extracts, garbled phrases of extracts of speeches that he had heard, and claims that he had heard, and he says that he was influenced by that to refuse to register. Here was a man who lived here, and as he said, had been born in this city, was a machinist, was presumed to have some acquaintances, and he attended the meetings, he says, of May 20th and May 27th, and he stood there, on the latter occasion for something like two
190 hours. On neither of these occasions could he name a single man that he had met who could corroborate his statement that he was there, nor could the Government produce a single person who could bear him out in his statement that he was there, so that, from the essential fact of this indictment, the aiding, abetting, and counseling of Mr. Schue not to register, there is absolutely nothing but his unsupported word.

Now, I maintain that, in his undertaking to show that he was there even, he has indicated a number of things that would tend to the conclusion that he was not there. He estimated the crowd on the first occasion to be—he said that he could not say whether it was 100 or 500 people—and you have heard the testimony of the officer who was there, Mr. Stucky, that there were about 1500 people, and it was otherwise estimated at about 2,000 people. It seems to me also that in his inability to say exactly about the other meetings that were being held upon the Square at the time he showed a remarkable vagueness of recollection, and altogether his story was one that could be very easily devised for the purpose of obtaining his own release from the punishment for his offense. I think it could be very easily constructed, that story, the details, so far as he gave them, and so I will rest my motion chiefly upon that ground. I claim, however, that the Government has failed entirely to show that these men have in their speeches or in any other way
191 used language that to any reasonable mind would have been a request for them or a solicitation for them not to register.

Thereupon the motion was argued to the court, and the court, upon consideration thereof, overruled the same, to which action of the court the defendants duly excepted.

192 Thereupon the defendants, to maintain the issues upon their part, called as a witness in their behalf, AMOS L. HITCHCOCK, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Amos Linden Hitchcock. I will be forty-one this Fall. My occupation, carpenter. I was born on Put-in-Bay Island

in Ottawa county, this state. I have been all over the United States since then. I have lived in the city of Cleveland since 1903.

I attended a meeting on the Public Square in the month of May in which Charles Baker was a speaker. That was at the rostrum on the Public Square adjacent to the recruiting booth there now. The recruiting booth was not there at that time. When Mr. Baker was speaking at that meeting, I was kind of circulating around the crowd. At no time except for a few minutes was I anywhere close to the rostrum that day. I heard only part of his speech. I do not recall the particular part in which he discussed conscription and registration. There were several hundred people in the crowd. It was a rainy day, and, of course, the crowd was small. We stood in the rain. I believe I attended a meeting on May 13th. If that was on a Sunday and there was a meeting on the Public Square, I was there. I do not recall Mr. Baker speaking on the Public Square except that once. I attended a meeting later on the Public Square on the Sunday after Baker spoke. As near as I can recall that was the 27th of May. I was chairman of that meeting.

193 The speakers were Max Hayes, Ruthenberg and Wagenknecht. Max Hayes spoke first. After him Wagenknecht and following him, to the adjournment, Mr. Ruthenberg. I remained throughout the entire meeting. I was within arm's length of the speakers at that meeting. In my judgment, there were probably three or four thousand in the crowd at that time. The crowd was standing entirely around the rostrum. Both of them were on the park side, the Square side. There were some back of the rostrum on the sidewalk. When Mr. Wagenknecht was speaking, he faced to the east. Max Hayes was speaking when we arrived there. I was a little bit tardy and Hayes was a little bit early, and on account of there only being one rostrum, he started the meeting early in order to hold that rostrum. There was another party who had been using it right along and we wanted that time. The other party was some man talking on a religious feature that he was fostering in Benton Harbor, Michigan. There was no other meeting going on at the time that our meeting was being held. At the recruiting booth which had been built just previous there was music and a speaker spoke for a few minutes. The music was fife and drum music. That was the only other meeting that I noticed. It was while Ruthenberg was speaking this music started up.

Q. I wish you would state now what you heard Mr. Wagenknecht say? Give as clear a summary of his talk as you can, of what he discussed and the effect it made upon you, what you remember?

The Court: I do not think you mean the effect, but, as I
194 interpret your question, it is for the witness to state literally, if he can, and, if not, the exact substance so far as he can now recall it, what he said.

A. This matter of remembering those things strikes people differently. I am used to attending these meetings, and I hear prac-

tically the same thing a great many times and do not pay so very much attention to it. I had duties to perform at that meeting and I knew practically what the man was going to talk about, that is, in a degree, and I do not pay so very much attention to their exact words. The purpose of our going there was in opposition to the war, and we were in a campaign——

The Court: Just a moment. He is beyond your question.

Q. I wish you would try to state what you heard Mr. Wagenknecht say. I do not suppose you can give the exact words, I do not ask it of you where you cannot—give the line of his argument and discussion.

The Court: Give the substance of what he said.

A. He, of course, made the assertions that we were there in the interests of peace, that we did not want war, and that we were going to continue fighting until peace was attained. That was the substance of what he said, as near as I can recall.

Q. What did he say about registration?

A. He did not like the registration and believed that it ought to be repealed.

Q. Did he use the word "repealed"?

A. He might not or might have said "repealed," but
195 whatever term he used was to that effect, until Congress rescinded it or until it was repealed, or words to that effect.

Q. Did he advise anybody to register or not to register?

A. Not that I recall, no advice of that character.

Q. No advice of that character?

A. No, sir.

Q. Did he advise any opposition to the conscription law in the way of refusing to obey the law?

A. No, sir.

Mr. Wertz: If the Court please, I would like to interpose an objection here. He should ask what was said or done there.

The Court: Yes. Both last questions were objectionable. I will sustain the objection.

Mr. Wagenknecht spoke from a few minutes to four until a few minutes past four. There was a stenographer in the crowd. He stood almost in front of the rostrum, possibly 15 feet away, maybe not so far. I did not take particular observation of him, while Mr. Wagenknecht was talking. In fact, I could not see him except when I was on top of the rostrum. There were a number of police officers around at the time. I am not acquainted with Mr. Lind, the police prosecuter. Mr. Wagenknecht's speech ended abruptly. I do not recall his exact words but it was in opposition to the conscription, wherein he said that the only way they had of registering protest was either by observing the law or not, it was optional with them, it was up to you, and at that time an officer came around the back of the rostrum and just wiggled his finger, and that ended it. After Mr. Wagenknecht was arrested,

196 I was very busy. Part of the audience undertook to follow the officer and Wagenknecht away and my duties then was to get them back there to their meeting and to advise them not to leave the place but to remain and hear the next speaker.

The next speaker was Mr. Ruthenberg. He began to talk about four o'clock or a few moments after. He talked probably forty or forty-five minutes. During that time I did not notice the stenographer. While Mr. Ruthenberg was talking I gave no more close attention than I did to the previous speaker. There are only a few things that I recall particularly of his talk. The first was that he was going to make his speech as he had intended regardless of the fact that the former speaker had been arrested, and he went into the constitution, quoted from that and quoted from a speech Daniel Webster made in regard to the draft law during the Civil War. He made a long speech there. I could not recall that speech. With regard to registration, he said that he himself would not register. I could not say what else he said about it. I would not attempt to try to repeat what he said because I do not recall it clear enough. I cannot give anything further in his speech that I could be sure of.

Cross-examination.

By Mr. Wertz:

I heard Mr. Wagenknecht give no advice as to registration. I was present on the 13th at the hall where the resolution was adopted.

197 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf, WALTER F. BRONSTRUP, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Walter F. Bronstrup. My occupation is that of electrician. My age is 33. I was born in Cincinnati, Ohio. I am a resident of Cleveland, and have lived here since May, 1910. I was present at all the meetings on the Public Square in the month of May. I recall a meeting at which Mr. Baker spoke. I was in the crowd next to the rostrum, at the side. While Mr. Baker was speaking, I gave close attention to what he said. I cannot give his speech in words but the sense of his speech. I never tried to recall the speaker's exact words.

Q. Go ahead.

A. The meeting that Charles Baker, of Hamilton, spoke at upon the Square, as near as I can remember, Comrade Baker spoke against this country entering into the European War, give the cause of the war, and give the socialists' standpoint, the cure for wars, and he stated that he, being of conscription age, would refuse to be conscripted.

Q. What did he say about registration?

A. He told the people that there was a law to be passed on regis-ration, that it was up to them to obey it or not to obey it, as they aw fit.

Q. Is that all he said on that subject?

A. Oh, he elaborated on the argument but that was the sense of his argument.

Q. State what advice he gave to the crowd with regard to egistering or not registering of young men of registration age?

A. He gave them no advice, if I recall correctly, whether they ould register or not register. It was left up to the individual. aker had to, as a socialist speaker, abide by the decision of the ocialist Party.

The Court: Baker had to, as a socialist speaker, to abide by the ecision of the Socialist Party?

The Witness: Yes.

Q. Can you go further with your recollection of his speech?

A. That was the sense of his speech; that is all that I recall.

As to whether there is anything further that I can recall on that ubject or the incidents of that meeting, I recall who the speakers ere, but that is all of importance of any of the argument. Mr. aker began speaking about a quarter past three or half past three. le must have talked for an hour. During that time we had a crowd at I should judge would be close to 3,500 people. It was clear eather at the time. The only noise that interfered with the speaker r the speaking or hearing of any of the speeches was applause. here was frequent applause. At times it lasted for a few minutes nd at times only a burst. The street cars were running but if one close enough to the speaker they do not interfere. A man standing ten feet away could not hear all the time. I did not observe any police prosecutor or officer of that sort that I know of in the crowd.

I was present at another meeting in the Public Square later than e Baker meeting. I was present the following meeting and a revious meeting. The week following the speakers were Hayes and agenknecht and Ruthenberg. Hayes was talking before I came. got there at 2:30. I did not hear any part of his speech. I arrived st before Hayes got down off of the platform. I heard Wagenecht's speech. While Wagenknecht talked I was standing about n feet in back of the rostrum. During the time he was talking at mes I could not hear all of it. I did not pay much attention to omrade Wagenknecht's talk, but from the drift that I heard, it as that he spoke against conscription. The advice that he gave to e crowd in regard to registration was that it was up to the indidual to register if he wished to or not. I did not pay much attenon to what he said in regard to conscription. I don't know whether e mentioned conscription. I cannot recall anything else he said. fter his remarks the police officer walked up to the rostrum and sked him or seemingly asked him to come down off of the rostrum. nyway, he got down and the police officer took him out of the owd. Almost a riot followed his removal. When Comrade Wagen-

knecht was taken off of the rostrum by the policeman it seems as though the crowd resented his arrest and they rushed after the police, and the chairman of the meeting jumped on the rostrum and advised and hollered at the crowd there through a magaphone
200 to remain here, to leave Wagenknecht go to the police station, that this was their meeting and for them to be quiet and come back and listen to the other speakers. After that the chairman announced the next speaker who was Ruthenberg. Mr. Rutherberg first called the attention of the crowd to the act that was just committed. He cited that it was in violation of our constitutional rights, the right of free speech, and then proceeded on a lecture giving the cause and horrors of war and the socialist position as to conscription. He stated that the position was that the Socialist Party was opposed to all wars and that the Socialist Party, that is, the members of the Socialist Party would not be conscripted, that is, those that held the Socialist Party dear, and he stated that he personally as an individual would rather be shot than to be conscripted. As to what he said about registering, he left it up to the individual to register or not to register. That is all I recall of his remarks at present. I am almost certain that there was a religious meeting being held on the other corner of the Square at that time. There were other sounds made by the street cars, and the recruiting station had some music by a fife and drum corps. It was playing during Ruthenberg's talk.

I noticed a stenographer while I was there. He stood to the left of the speaker. I noticed that he was taking notes and talking to some other individual—two, one on each side of him. I noticed him
201 talking to them about four or five times during the meeting. (Mr. Schue stands up.) I never saw that man (indicating defendant Schue). I did not see him at either of those meetings.

Cross-examination.

By Mr. Wertz:

I am an active socialist and I attended all of the meetings. As to the meeting on the 27th, on the occasion when Mr. Wagenknecht was placed under arrest, I could not hear all of it. I remember some of his remarks against conscription. The impression Mr. Wagenknecht left with me was that it was up to the individual if they wanted to register or not. That is the impression both of them left. I have told all I remember of these different speeches at that time.

I do not recall that Ruthenberg said in his speech: "We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the Billy Sunday form of revivalism to induce you to register for conscription. They are afraid." I do not recall Ruthenberg's saying: "They are afraid that the working class of this community may on registration day enact their own referendum in regard to this law by refusing to register."

I do not recall that Mr. Ruthenberg said: "What is to be the posi-

tion of the working class of this nation in regard to war and registration for conscription?"

202 I do not recall his saying immediately following the above: "Are we in this country, having been bludgeoned—no other word describes it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the President and Congress was elected—are we to meekly submit and lie down and permit the ruling classes to do its evil, base, dirty work?"

I said in regard to Mr. Baker that I knew that Baker did not say anything against conscription because Baker had to, as a socialist speaker, abide by the decision of the Socialist Party. What I mean by this is, that when we send out speakers they have got to abide by the constitution and by-laws adopted by the Socialist Party; otherwise they would be recalled. That does not include resolutions adopted by the Socialist Party.

I cannot find anything in the by-laws of the Socialist Party that prevents Baker from making a speech against registration and conscription.

I have heard of the resolution that was adopted on the 13th of May: "Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the 13th Amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the Party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class." That

203 resolution was not binding on Comrade Baker. I do not recall whether this resolution was mentioned in the speaking of Baker, of Wagenknecht or Ruthenberg.

I do not recall this in Mr. Ruthenberg's speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription. We have taken this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country to enact any laws which are intended to force submission of the people to involuntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law." I suppose that possibly that was stated. If those are the reports of the meeting, I suppose I did hear that in substance.

As to the following language, I remember statements similar to that made by Mr. Ruthenberg. It was in that speech, but whether at the Square or some place else I do not know; "And so the Socialist party of the City of Cleveland by resolution has gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is

just as wrong as the murder of an individual—as urging and
204 recommending to every worker who does not desire to take a gun and shoot down his fellow human beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the Socialist Party that we urge and recommend that they refuse to be registered for conscription."

I do not remember hearing the following statement: "My friends, I am ready to say more: That if this law is amended, if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the millions against the socialists on the battle fields of Europe, if, after the first million or two of the flower of the humanity of this country has become the victims of the ruling class in their insensate greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends this law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted." I may have heard it in substance; I don't remember.

I do not recall the following statement or the substance of it: "I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made. I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder. I would be saying little to you if I left
205 you only with this message. If I only told you that we socialists did not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete. What are we to do? What are we to do? What have we the power to do? My friends, let me say first and foremost that the one thing which we must not do in this crisis—we of the working class must not resort to any kind of force. Let us willingly and gladly go to jail rather than to the trenches."

I do not recall this statement: "Come over to Market Square at Lorain and 25th and we will again present to you the facts of the betrayal of the people of this country by its servants in declaring war and placing a conscription law on the statute books."

I do not recall the following statement in Mr. Wagenknecht's speech: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the Socialist Party of the United States, and, not agreeing with the official action of the Socialist Party of the United States, we must say this afternoon Max Hayes does not speak for the Socialist Party. The Socialist Party has taken a very definite and decided stand upon this matter of registration for conscription."

I did not learn that Max Hayes had advised the audience that it was their duty as American citizens to obey that law and register under it, prior to the speech of Wagenknecht. I heard it later.
206 Whether it is the truth or not, I could not say; I wasn't there; I didn't hear it.

I do not recall the following statement by Mr. Wagenknecht:

"The National Convention of the Socialist Party went on record and declared that it shall be the duty of every dues-paying member of the Socialist Party to fight and fight and fight and fight until there is no more fight left in them against conscription whenever and wherever he can."

I do not recall this in his speech: "And we are going to fight. We don't intend laying down on the job at this time, just because our capitalistic government, controlled by the Rockefellers and Morgans, say to us, 'You shall do so and so.'"

I do not recall this in Mr. Wagenknecht's speech: "Now, the socialists don't care a *shoop* in hell which capitalistic class is the most powerful in this world. All we care about is that we shall make the working class of every country the most powerful in that country."

I do not recall this of Wagenknecht's speech: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, 'The time is come when we, through organized power and strength, must say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'"

207 I do not recall this statement: "Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, you understand, in this movement for working class liberty, but then somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand. And so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription. You can either register and run a chance of being drafted, or you can refuse to register and go to jail."

P. Do you recall that after that statement there was much applause and cries of "Jail, jail" from the audience?

A. No, sir.

Q. Do you remember of the audience calling "Jail, jail" at all during that speech, do you recall that?

A. No, sir, I do not recall.

Q. Do you recall this: "Now, you have a right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has a right to say that you shall register and go to murder." Then there was loud applause. Do you recall that?

208 A. I do not recall.

Q. Do you recall this? "Well, the question is, of course, you may applaud this afternoon, but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th; that's the question, friends. The conscription law and its success, understand—the conscription law and

its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? A man—a man within the age limits—any man—any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest. There are subsequent ways to protest, but this is the first place to protest." Do you recall that in Wagenknecht's speech?

A. No sir.

Q. Do you recall this being in Mr. Wagenknecht's speech: "Now, then, we are here this afternoon to explain the situation to you. What we say this afternoon is this: That every man has the right to do one of two things; and I want to repeat that. He has the right to do one of two things. He can either refuse to register and run a chance of going to jail—" Do you recall that just before
209 he was arrested?

A. No sir.

Redirect examination.

By Mr. Sharts:

The pamphlet you hand me is the constitution and by-laws of the Socialist Party. The pledge in there is the pledge that is taken by the members of the socialist organization.

Q. I wish you would read that pledge to the jury.

Mr. Wertz: If the court please, I object.

The Court: I sustain the objection to it on the ground of immateriality and irrelevancy.

Mr. Sharts: Enter an exception.

210 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf, JOHN A. FROMHOLTZ who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is John A. Fromholtz. My age is 29. I was born in Buffalo, N. Y. and lived about twenty years in Buffalo and nine years in Cleveland. I am within the registration age, and have registered. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have not consulted Mr. Ruthenberg regarding registration.

I attended meetings on May 20th and May 27th in the Public Square. I recall the speech of Mr. Baker.

Q. I wish you would give us as well as you can the speech of Mr. Baker, what you got from it, the substance of it, as well as you can?

A. As much as I know, the main thing was sort of conscription.

I don't know anything he said I should not register because always——

The Court: Repeat what he said in substance as well as you recollect.

Q. Go ahead.

A. As much as I can say is that he says the Socialist Party was opposed to conscription but there is nothing to hinder me—there is nothing that I know of that he said that the people should not register.

Q. That is, you say that he did not say anything about registration?

211 A. Yes, sir.

I am a member of the Socialist Party. I attended the meeting on May 27th. At the meeting there, Mr. Wagenknecht was chairman, I think, and Mr. Ruthenberg, and, I think, Mr. Hayes were speakers. Mr. Hayes spoke first. He stated pretty nearly the same words as Mr. Baker, that he advised young men to register. I cannot recall the substance of Mr. Wagenknecht's speech. Mr. Ruthenberg said as much as the Socialist Party was against conscription, and not anything as to registration.

Cross-examination.

By Mr. Wertz:

I have been in the witness room today. The boys out there who are witnesses have not been talking over what this law suit was about. I did not discuss with any of them the testimony to be offered on the witness stand. Nobody talked with me about what I was — testify about. I never spoke to Mr. Ruthenberg at all. I just came here this morning. I never talked to their lawyers about it as to what I should say. I did not tell them what I was going to testify to at all. I am in the electrical business. I recall the speech of Max Hayes and that Max Hayes said to the audience over there that while they were opposed to this conscription law, yet that that law required all citizens of this country to register for conscription, and that while that law was on the statute book it was their

212 duty to go and register under that law, and he further told us that while they were opposed to the law, that the proper way to get away from that law was to have that law repealed in Congress, and not to violate that law by refusing to register. I am positive that Max Hayes said that.

Q. Do you recall that Wagenknecht said this, in introducing himself to that audience: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes does not quite agree with the official action of the Socialist Party of the United States," applause. Do you remember that?

A. I think I remember that sentence.

The Court: You think you do?

The Witness: Yes, sir.

The Court: As made by Mr. Wagenknecht? Do you understand it?

The Witness: Yes, sir.

Q. Do you remember this immediately following: "And, not agreeing with the official action of the Socialist Party of the United States, we will say that this afternoon Max Hayes does not speak for the Socialist Party." Applause?

A. I could not state that I heard that.

Q. Did you hear that in substance?

A. Because at times he was interrupted

Q. You would not say that it was not said there?

A. No, sir.

Q. Then did you hear this statement immediately following:
"The Socialist Party has taken a very definite and decided
213 stand upon this matter of registration for conscription."
Did you hear that?

A. No, sir.

Q. Did you hear that in substance?

A. No, sir. At times I had to move into the audience in order to hear some sentences.

Q. So that you would not say that it was not said?

A. I would not say.

Q. Did you hear this: "The National Convention of the Socialist Party went on record and declared that it shall be the duty of every dues-paying member of the Socialist Party to fight and fight and fight and fight until there is no more fight left in them against conscription whenever and wherever he can," applause. Do you remember that?

A. I may have heard some of that statement. I could not say for sure, because I just know—my memory is not whole clear on that now.

Q. Do you remember this: "And we are going to fight. We don't intend laying down on the job at this time just because our capitalistic government, controlled by the Rockefellers and the Morgans, say to us, 'You shall do so and so.'"? Do you remember that?

A. I think I remember that. Yes, I remember that sentence.

Q. Then, do you recall this from Comrade Wagenknecht: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in
the dust and eat sand for the rest of your life, or you can at
214 last stand up like men and say, 'The time has come when
we, through organized power and strength, say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'" Do you remember that?

A. Yes.

Q. Do you recall this from Wagenknecht: "You can either register and run a chance of being drafted, or you can refuse to register and go to jail." Applause and cries of "Jail, jail." Do you remember that?

A. Yes.

Q. Do you recall that Mr. Wagenknecht made this statement following that: "Now, you have a right to go to jail, don't you know. You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has the right to say that you shall register and go to murder." Loud applause?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

The Court: Your answer was that you say you recall that as having been said?

The Witness: Yes, sir.

Q. Do you recall this statement by Wagenknecht: "Well, the question is, of course, you may applaud here this afternoon, but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th?"?

215 A. I could not say that I heard that.

Q. Did you hear that in substance?

A. No, sir.

Q. Does it occur to you that if that was said, the subject of that speech by Wagenknecht was refusing to register instead of conscription?

A. No, because if he stated that and I followed it I would not have registered, and I registered.

Q. So that you did not hear that over there?

A. No, sir.

Q. Do you recall hearing this: "The conscription law and its success, understand—the conscription law and its success, depends in a measure upon the fact that thousands upon thousands will refuse to register." Do you recall that?

A. I do not recall that statement.

Q. Do you recall this statement: "A man within the age limits, any man, any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest." Do you recall that?

A. No, sir.

Q. Do you recall that statement in substance?

A. No ,sir, I do not recall it .

Q. Do you say that that statment was not made there by Mr. Wagenknecht?

216 A. I could not say that he made that statement. I did not speak to any person about it. I just moved through the audience at different times. I never stayed one place on account of the difficulty of hearing. Sometimes I got up in front and at other times I was forced back further by other people getting in front of me.

Q. Now, do you recall this in Mr. Ruthenberg's speech: "The capitalist classes are not fighting a war of democracy. The United

States is not fighting a war for democracy. It is fighting a war for commercial imperialism and the profits of the capitalist class of this county." Do you recall that?

A. I do not.

Q. Would you say that it was not said there?

A. I could not say that. I did not speak to any person in regard to that lecture.

The Court: The question is whether Mr. Ruthenberg said that or said that in substance on the 27th of May on the Public Square, according to the best of your recollection?

The Witness: I can say that to my recollection, I cannot recall that statement.

Q. Do you recall this statement in Mr. Ruthenberg's speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription. We have taken this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country
217 to enact any laws which are intended to force submission of the people to involuntary servitude, and we take the position that when Congress enacts a law which is a violation of a fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law. (Applause.)" Do you recall that?

A. I recall that.

Q. "And so the Socialist Party of the City of Cleveland by resolution has gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow-human beings no matter whether they are being called the Germans, or Austrians, or Russians, or English—whatever their nationality may be—we have said to those workers, by official action of the socialist party that we urge and recommend that they refuse to be registered for conscription."

A. I do not recall that statement at all.

Q. You do not recall that?

A. No sir.

Q. Will you say that it was not said there?

A. I cannot recall anything at all about that.

Q. Do you recall it in substance?

A. All I can recall in the statement is that we were
218 opposed to wholesale murder, but not as to registration.

Q. But not as to registration? Do you recall this statement by Mr. Ruthenberg? "That if I came between the age provided for in that law, that I would refuse to register for conscription."

A. I do not recall that.

Q. Do you recall Mr. Ruthenberg saying that in substance?

A. I do not recall that.

Q. Do you recall him saying that if this law was amended so that it included his age that he would refuse to become the victim of the ruling class and be conscripted; do you recall that?

A. I cannot recall that either.

Q. Now, you say that the Socialist Party was not opposed to registration?

A. Yes, sir.

I was not up to the Socialist hall on May 13th when the resolution was adopted on the question of conscription. I was out of town. I never saw that resolution.

Redirect examination.

By Mr. Sharts:

I have had no talk with you in regard to this case. I have never talked with Mr. Wolf since or before the trial. I just arrived in town last night.

219 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf A. E. FROMHOLTZ who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is A. E. Fromholtz. I am thirty-two years of age. I was born in Buffalo. I have been living in the city of Cleveland off and on for the last ten years. My occupation is that of electrician. My brother was the witness who was just before me. I am not a member of the socialist local. I attended meetings on the Public Square in May and attended a meeting on the 20th of May. I heard Charles Baker speak.

Q. Can you tell the jury in substance what he talked of?

A. Why, I remember he said that, as a follower of Jesus Christ, that he could not kill another man, that he would not shoulder a gun.

Q. Was that just about all you remember of the speech?

A. Yes, that is about all that stands paramount in his talk.

Q. Do you recall whether or not he advised the crowd in regard to registration?

A. No, sir.

Q. Whether they should register or not?

A. No, sir.

The Court: What is your answer to that—that you do not recall whether he did, or did not?

The Witness: That I do not recall that he made a statement—the only statement I remember was that, as a follower of
220 Jesus Christ, he could not shoulder a gun to shoot down another man. That is all that stands out in my mind.

Q. Do you recall any other statement at all that he made in regard to registration? Did he talk about conscription?

A. Well, inasmuch, as he could not shoulder a gun, he would refuse to be conscripted.

Q. To be conscripted?

A. Yes, sir.

I was present at the meeting on May 27th. I was there for part of the speech of Mr. Hayes. I did not hear all of that speech. I heard when he was talking of New Zealand and Australia, and then I went across the street to buy a cigar and when I got back Wagenknecht was on the stand. I heard what Wagenknecht said. I heard him make a statement that the people of the United States were not consulted on the conscription bill. About the only statement that I remember was that the people of the United States were not consluted about the conscription bill and when I came back into the crowd I had a cigar and I stood next to a woman and I must have blown the smoke into her face and she made some remark about it, so then I went to go to the outside of the crowd and while I was walking to the outside of the crowd Wagenknecht was pulled from the stand.

I listened to the speech of Mr. Ruthenberg that followed. I do not know as I can recall anything definite of that speech, only that he stated the cause of the war, the profits of munition manufacturers that they were making and I think that he also made
a statement that Root, Roosevelt, Taft and Burton signed
221 a statement in the last campaign stating that all wars were caused or had a basis in trade and commerce, and we need not rely on the socialists making those statements, but to take them from the leaders of the republican party. I do not recall what if anything, he said on the subject of registration. As to what he said on the subject of conscription, he said he would not go to war.

Cross-examination.

By Mr. Wertz:

I have testified to everything that I heard said there that I can remember.

222 Thereupon the defendants, further to maintain the issue upon their part, called as a witness in their behalf the defendant CHARLES BAKER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Charles Baker. I am state organizer of the socialist party of Ohio. My age is 26 and I am within the registration limits. I have registered. I was born in Hamilton, Ohio and have resided there since. I first visited Cleveland last fall, spent a week here on a lecture tour, but this year I came on the 18th of May. That is the day the conscription act was passed. I had not seen

this leaflet marked "Government's Exhibit No. 2," entitled: "Down with conscription." The first speech I made after I arrived in Cleveland was when I lectured the first Thursday night on the corner of 9th and Vincent Streets. If Sunday was the 20th, then I came on the 17th. I came into the city of Cleveland on a Thursday night, either the 17th or the 18th of May, and spoke at the corner of 9th and Vincent.

I first spoke on the Public Square on May 20th, Sunday. The audience was, I should judge, between 3,000 and 4,000 people. There was noise around there, general noise on the Public Square, street cars moving and automobiles and traffic in general. The noise is greater at some times than at others. I began to speak about three o'clock, I should judge. The speech that I delivered there is a speech that I have been delivering in the state of
223 Ohio for the last four months, substantially the same thing.

Q. I will ask you, Mr. Baker, now to repeat to the jury that speech as well as you can that you delivered on the 20th of May at the Public Square?

The Court: Just testify to the jury, according to the best of your recollection, what you said on that occasion on the Public Square in that continuous speech.

224 —. My lecture was—I did not deliver it in full on that occasion, due to the fact that there were other speakers present and the program—the length of time would not permit, but the lecture that I have been delivering over the State of Ohio under the auspices of the socialist party was entitled: "The Cause and Cure of the World War" in which I took up the economic cause of the war.

The Court: We want you only to give that part of it which you repeated in the speech in the Public Square.

The Witness: That is what I was going to do. I stated that I did not deliver the entire lecture and it would not be necessary to give it all to you, as you wanted just what I remembered of what I said at this particular meeting.

I took up and showed the economic cause of the world war and the concentration of wealth in the United States. I showed that the world war has been caused by the expanding of commercialism, the development of industry. I quoted the statement of Abraham Lincoln, made fifty years ago, to the effect that he saw in the near future a crisis approaching which caused him to tremble for the safety of his country, where the wealth of the nation had become concentrated or would become concentrated in the hands of a few individuals, and through this concentration of wealth the great bulk of the American people would bow down on their knees
225 and worship the god of Mammon.

Then I quoted the report of the United States Industrial Relations Commission, which we term the latest statistics on the concentration of wealth, and showed on page 33 of Basil M. Manley's report, the Secretary of the United States Industrial Relations Commission, where the wealth in America to-day had become concentrated to such an extent that 2 per cent of the people of America

owned and controlled 50 per cent of the wealth, and 33 per cent of the population of America owned and controlled 35 per cent of the wealth, and the remaining 65 per cent of the population of America only owned and controlled 5 per cent of the wealth.

Then I went on to show what had caused this concentration of wealth, namely, the private ownership of the means of life, the tools of production and distribution, the mills, the mines, the factories, and the railroads, and the natural mineral rights of the nation, which the socialist movement claims has been placed here by the Creator or by Nature as a blessing to all mankind; that through some method these things that have been placed here for the blessing of all mankind have become vested in the hands of a group *of* a few individuals, and through the private ownership of these means of life upon which humanity depends collectively for its ex-
226 istence upon the earth, through the private ownership of these means of life, they have been enabled to exploit the working class, who must use the tools of production and distribution that they do not own.

And I quoted the Government statistics, the report of Carrol D. Wright, Labor Commissioner for 25 years, showing the portion of wages received by the working class in producing the wealth in this country, where, after producing a dollar's worth of wealth in the factories that are privately owned by the master class, the capitalistic class, they receive in actual wages 17 cents, enabling 65 per cent of the population, which is the working class, to buy off of the market, to consume and enjoy, 17 per cent *per* of the wealth that they had produced, leaving 83 per cent of the wealth to remain upon the market, and that portion which the master class does not consume in their riotous living is piled upon the marke*d* as unconsumed commodities, and it lies on the markets, and every fourth and seven years in America we witness what is known as an industrial depression. The first one I witnessed was in 1898. Being a member of the working class, I lived that entire summer on parched corn and molasses.

The Court: Is that what you told them?

The Witne s: Yes, sir. I am repeating the speech. And I remembered the next panic of 1907, and the papers tell us in these
227 times that when the factories close down and thousands of men are unemployed, that there is an overproduction, and I could not see how there could be any overproduction of clothing when people were wearing rags, how there could be an overproduction of food when one-third of the school children of New York went to school every morning underfed, according to the health reports of that city, or how there could be an overproduction of any of the necessary things of life when the working people in general were depriving themselves of the necessary things of life.

So we term it not a case of overproduction, as claimed by the papers during these industrial depressions, but a case of under-consumption; that the great bulk of society that has produced this wealth had not received enough in wages to buy it off of the market and enable them to enjoy and consume it. Therefore it was an unconsumed com-

modity, and not a case of overproduction but a case of underconsumption.

And then I went on to show the peculiar state of affairs which the country is placed in every four to seven years through this so-called overproduction, that the factories close down and there are no orders go into the factories to produce any more commodities until they dispose and sell the enormous amount of commodities which has piled upon the market, and when there are no orders go into the factories to produce the working man is laid off and thousands of them are unemployed, and then we find always in this peculiar state
228 of affairs there are no orders go in to produce until they sell what is on the market. They cannot sell what is on the market until the working people buy it. The working people cannot buy it until they get money, and they cannot get any money until the factories start to work and employ them, and the factories cannot start to work and employ them until they get orders to produce. They cannot get orders to produce until they dispose of what is on the market, and they cannot dispose of that until they get money, and so forth, and so forth. It is an endless chain.

So that the only hope is to dispose of the commodities on the market, and we have found that the working class, thousands of them, are unemployed in these industrial panics, and we find the larger metropolitan cities of America putting up soup kitchens and bread lines, and find poverty and misery running amuck throughout the homes and the districts of the working class and there is want and privation among the people who are employed, who are tramping the highways and byways of the United States seeking a place of employment where they may give their labor power to produce in order that their children at home may enjoy what they had produced, and when there is a general unemployment over the country, thousands of men unemployed—and it is a well known fact that when a person's stomach begins to growl for want of the necessary things of life, he thinks more in that state and in that condi-
229 tion and it is to the interest of the man who sits on the throne of power, who privately owns and controls the means of life—it is to his interest to see that the general working class is kept busy and steadily employed, because, unemployed, they become more dissatisfied than ever, and, in order to keep them employed, he must keep the wheels of industry turning, and, in order to keep the wheels of industry turning, he must dispose of the commodities on the market, and, in order to dispose of the commodities on the market which are unconsumed, he is compelled to find a market, and as he cannot find a market in America, he is compelled to go out of the realms of the United States in which to find a market so as to turn in to gold those commodities which he had exploited out of the working class of this country through the private ownership of the means of life upon which mankind depends for its existence.

Then I showed that this world war is the outcome of the competitive system. It is the natural outcome of the private ownership system. That is the natural stage that we are traveling in the progress of the human race. That as the human race travels up

through the different stages in its travel from the beginning of time all through barbarism, savagery, feudalism, into capitalism, so it will naturally follow that it will have to travel on out of capitalism into the next way, the way of collective ownership or the cooperative commonwealth, as the socialist movement terms it, or the industrial
230 democracy, where the people themselves will own collectively those things upon which their life depends collectively.

I showed that the war of Europe three years ago was caused by the commercial greed, and how every war has been caused by commercial greed, the desire of one class of one nation or the individual of the nation to possess that which another nation or the class of another nation has in their possession, and the desire of commercialism to expand and dominate the markets of the world.

Then I went on to show the horrors of the European war and how this world war has been brought on, namely, that we never had a world war between all of the nations of the world until the system of private ownership had become modernly developed in all of the nations of the world, until they found that the wheels of industry and the tools of production and distribution had become developed in all of the great nations of the world, that the private ownership of the tools of production in each of these nations was exploiting the working class of their own respective nations out of billions of dollars every year, and they had to find a market to dispose of it. And we find in the year 1917 that industry developed in all of the nations of the world, and they were all sending out their industrial scouts, seeking foreign markets, and that the world war has been the result of the desire of the master class of all
231 of the nations of Europe to expand in the domination of the world market.

I went on and showed the horrors of the war and the evil conditions that prevailed and what the outcome of the war would be, and then I took up and showed the price that the working class will pay and the price that they have been paying in the trenches of this horrible world war, the murder of hundreds of thousands, the breaking of millions of homes, the breaking of the hearts of the motherhood of Europe, and the rendering of millions of children orphans, and so forth, showing the horrors of the war condition; that the price that the working class of Europe had been paying for the last three years in this war was not the purchase price of their liberty but it was the penalty price of their stupidity; that they had it in their power, as they had it in their own hands, the means of ushering in the new society, by the peaceful use of the ballot, as the socialist movement advocates, but they had rejected the idea of the socialist movement, of ushering in the new society by a peaceful way, and now they were going to pay the price upon the field of battle.

And then I went on to show how that the glories of the war and the splendor of the war that led the working class right into the trenches three years ago—that it was all drowned out of existence, that after three years of war the glories of war were not so beautiful any more and now after the war had been in existence for three years we find the working class of Russia going home and

demanding of the Czar why they were fighting, and the Czar, being unable to tell them, having, the same as the kings of the other nations, assisted in plunging them into the war, did not know what they were fighting for, and the result was that the working class of Russia overthrew the Czar and established the first industrial democracy and wiped out of existence in a revolution of three days the blackest autocracy that the pages of history ever records.

I went on to show how the socialist movement in Germany, which had supported the Kaiser and the fatherland at the outbreak of this war, led by the belief that it was a war of defense, that they had to defend the fatherland—how part of the members of the socialist movement at the out-break of the war deserted the fundamental doctrines of international socialism and supported the Kaiser and the fatherland in the war at the beginning, and how now, after realizing the conditions and the state of affairs—how now they were standing up and demanding in the German reichstag for the first time in the history of that nation the overthrowing of the Kaiser and the establishment of a democracy in Germany, and how that the present war in Germany would not cease until the working class had come into their own, the same as they had in Russia.

I went on to show that Spain was *reeking* in the throes of a revolution, that China was *reeking* in the throes of a revolution, that England was having its troubles and that the king of England through pressure being brought to bear, the internal strife that was caused by this world war, was going to grant Ireland its liberty and its home rule which 12 months they refused to give them, and 12 months ago, when Ireland demanded this home rule and liberty from England, the champions of Irish liberty were shot down in cold blood on the streets of Dublin, and their crime was asking for liberty from Great Britain, and instead of giving them liberty they received from Great Britain the same thing that George Washington and the thirteen American colonies received in 1776, when they asked for liberty. They received bullets from Great Britain, and the only reason that America received its liberty was that Great Britain possibly did not have enough bullets. But they had enough bullets for the Irishmen, and those who demanded liberty for Ireland were shot down in cold blood in the streets of Dublin, and now they were going to give them their liberty without asking for it. Now, the king of England is going to give them liberty when they are not even demanding it.

I showed that that was brought about through the glories of war being lost, through the working class having paid the bitter price. Now they are realizing their situation and they are going to demand something in their own interests. Then I treated the state of affairs in the United States and showed through a concentration of wealth in America, that through J. P. Morgan, while we remained as a neutral nation—America remained for three years as a neutral nation—that during this entire three years Morgan, as we were told, was the official purchasing agent of England and the allies. He not only cornered the food supplies along with his

followers and members of his own class, the food speculators, not only cornered the food supply of the market and shipped it across the pond and fed the world and starved America, but manufactured thousands and thousands of dollars' worth of munitions of war and shipped it across the pond.

I told them further that the master class of America, while America remained as a neutral country, not only shipped across the pond the millions of dollars' worth of munitions of war in order to feed the war of Europe, but also loaned them the money to buy it with. I claimed that this loan to the allies was not secured; that any money loaned for a destructive purpose never was secured, and that the only money that is secured is money which is loaned for a constructive purpose, to build up and not to tear down. Money which is loaned for a constructive purpose, to build up, is secured by that which is being built by it, but if you loan money for a destructive purpose and take as your security something already built, and then tear it down, then you lose your security.

Then I showed how it was to the interest of Morgan and the master class who had made millions of dollars out of this war, how it was to their interest that America should be engaged in this war.

235 I quoted them the records of the United States Congress, Senator Callaway of Texas, who has had it written into the records of Congress that the American financial interests sent out paid representatives and interviewed 179 newspapers of the United States with the purpose in view of purchasing their editorial columns and controlling the editorial policy in general of the daily press of the United States which molds the opinion of the American people, the same as the press of any other nation, and how, after going through an elimination process, according to Senator Callaway and the records of Congress, it was only necessary to purchase the editorial columns and policy of the 25 largest newspapers, and, according to Senator Callaway and the records of Congress, the 25 largest newspapers of America, were bought and paid for by the interests of Morgan, who has made billions of dollars out of this war while we were a neutral country, and that the daily press now is controlled, the columns, the editorials, and all articles that are written on war and military and financial and commercial and industrial matters in general, all international or national questions dealing with this war—that those articles and editorials are all written by paid representatives of the Morgan financial interests, according to Senator Callaway.

I showed them how that was a great assistance in leading the United States into this great world war, how the daily press was not voicing the sentiments of America, they were not voicing the

236 ideals that this nation is founded on, that they were voicing the ideals and those things that were to the interests of Morgan and the master class that had purchased the daily press, and that in voicing their sentiments and those things, that was in the interest of Morgan, that it was not the interests of America, and it was not to the interests of the working class of America.

I went on to show them that the working class of America is going

to pay the price, the same as the working class of Europe had to pay the price, that we are going to pay the price of blood, broken homes, broken hearts, dying and agony, and so forth. I stated that the conscription law had been passed; that there were going to be 500,000 young men conscripted and to be sent across to the battlefields of France, and so on, and that, according to President Wilson, he expected a million men to offer up their lives under the folds of Old Glory on the field of battle, and so forth, and showed that we had entered the war to such an extent that we were going to pay the price also, and that the price that America was going to pay on the battlefields of the world war would not be the purchase price of our liberty—our liberty has already been paid for upon the battlefields of 1776—but the price that we were going to pay in this world war was the penalty price for our stupidity, due to the fact that we have given to the master class of America—permitted them to privately own the means of life, the wheels of industry, and that they will only turn
the wheels of industry and turn out the necessary things of
237 life in order to produce a profit to its private owner, and that
after they turn out these different commodities, turn the wheels of industry, then they have got to find a market in which to dispose of these commodities, and that they have been compelled to go out into the markets of the world, competing with the master class of other nations in order to wrest markets from the hands of other nations.

I then quoted an interview I had with a newspaper reporter in the city of Akron who asked me what I would *I* do, knowing that I was of conscription age—what I would do if I was drafted by the United States. She said that she heard my speech in the city of Akron. She knew that I am opposed to war, a conscientious objection to conscription and war in general, and what I would do in case I was conscripted, and I said that I would refuse to be conscripted, that I would refuse to go to war, that the party that I represented, my ideals of the socialist movement, had a different way of settling the disputes between the master class or between nations except going out on the battlefield, that we could absolutely settle them in international conferences, boards of arbitration, even under the present system; that it was not necessary to go into the field of battle, and that, if conscripted, I would refuse to go to war. She asked me then knowing—if I knew what the penalty would be. I told her that I realized that
the penalties for refusing to be conscripted in time of war,
238 to refuse to answer the call of your country and go to war
and murder or possibly to be murdered—that the penalties in time of war was whatever a military court saw fit to hand down, from one day in the guard house to being lined against the guard house and shot. She asked me—"knowing this, what would you do?" I said "if I was confronted with that proposition that I hoped that at that hour I would have the courage of my convictions and that I would smilingly face the firing squad and refuse to go and murder men I had never seen in all my life," and I repeated this on the Square.

I urged nobody—a man asked me a question as to what I would

do. That is the way I put this question in. A man asked me a question, what I would do in case of conscription and I told him I would refuse to be conscripted and shoot down men I never saw, and then I gave a closing word, showing the general conduct of the world war and how we were evolving into the new era, and how that the industrial democracy, the co-operative commonwealth, as the socialist movement terms it, the collective ownership of the means of life, how it was being ushered into existence—not the way the socialist movement had planned, to the quiet and peaceful method of the ballot and the use of political action, but how it was being ushered in over the dying and mangled forms of bleeding millions who had the power in their hands to usher it in peacefully and how in the course of the next five to ten years we would be estab-
239 lishing the industrial democracy in the world and we would then start for the first time to living upon the basis of real and true civilization. I believe that is about all, your Honor.

A. I will ask you, Mr. Baker, if there was anything said about registration?

Mr. Kavanagh: I object.

The Court: It is quite apparent that the witness has exhausted his recollection of what he said. It is permi-sible for counsel to put the question as to what, if anything, in addition to what he has already said, was said on the subject of registration or of conscription or of any other subject matter, and you may go further and put to him, if you wish, the testimony of other witnesses as to what they say he said and ask him what he has to say in regard to that.

Q. You may answer that question, Mr. Baker.

A. What is the question?

The Court: What, if anything, in addition to what you have already testified was said by you on that occasion on the subject of registration or conscription.

Mr. Sharts: I asked simply about registration now.

The Court: All right.

A. I said nothing in regard to registration.

Q. Was any question asked regarding registration?

A. No, sir.

Q. In the testimony of Mr. Schue, which you heard, I believe, there was a statement made that you had said something
240 about the standpoint of the socialist party on registration. Did you make any such statement?

A. Not on the question of registration, no, sir.

Q. What were you confining your remarks to?

A. Towards the close of my lecture, along about the same time that I answered a question that a man asked in the audience: "What would you do in case of conscription?" I related to him an interview I had with a news-paper reporter in the city of Akron, which I gave in my other testimony, and then I called attention to the fact of the position of the socialist party in the national convention at

St. Louis, to which I was one of the delegates, their position on conscription, that we carry on an active campaign in opposition to conscription, and that we would do everything in our power to urge and bring about the repeal of the conscription law and the wiping of it from the statute books.

Q. I will ask you if you attended that national convention to which you were referring in your speech?

A. I did.

Q. I will ask you if you are familiar with the war program of the socialist party?

A. I am.

Q. I will ask you if this is a copy of it? (Handing paper to the witness.)

A. It is.

211 (Thereupon the said exhibit offered in evidence by counsel for defendants was marked "Defendants' Exhibit No. 1," and is hereto attached and made part hereof. Said exhibit was thereupon read in evidence to the jury by counsel for defendants.)

The speech that I delivered was based upon the program that is set forth in that exhibit. I have not advocated any principles or tactics in contradiction of that program.

Q. Have you been asked by any one what they should do in case of registration?

A. I have.

Q. By whom?

A. I was asked by three persons, members of the party from Lorain, Ohio, who came to Cleveland on Decoration Day and asked my advice, as the state organizer, what they shall do on the question of registration.

Mr. Wertz: I object.

Mr. Sharts: If your Honor please, it seems to me that the testimony is admissible at least to show the motive and purpose and consistency of the speech that he has made, to show the attitude of the speaker with regard to registration, which has been questioned.

The Court: No, I will sustain the objection to that. The charge here is a specific charge that is confined to his acts and conduct on a specific occasion when he was listened to by some person and when, it is alleged, he caused that person to violate the law and thereby made the defendant here a participant in that violation. That fact cannot be affected by proof as to what his attitude was on
212 other and different occasions. I will sustain the objection.

Mr. Sharts: Enter the exception of the defendants.

Cross-examination.

By Mr. Wertz:

I am familiar with paragraph 2 of the proclamation or resolution of the socialist party in St. Louis which was read by Mr. Sharts, and particularly the paragraph in which it is stated: "We pledge our-

selves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription." I learned after I came to Cleveland of the resolution adopted by the socialist party in Cleveland on the 13th of May, in which they suggest to socialists that they refuse to register for conscription and "Pledge to them our financial and moral support in their refusal to become the victims of the ruling class." I first heard of that during this trial.

I was not present on the 27th of May on the Public Square when Wagenknecht and Ruthenberg made their speeches. Tom Clinord and Mr. Ruthenberg spoke with me on the 20th of May. Tom Clifford did not refer to the resolution of the 13th of May. I never heard any of the speakers in the ten weeks I have been in Cleveland refer to it.

Q. What about the meeting on the 10th of June on West 25th Street—did you hear this resolution spoken of over there at that time?

Mr. Sharts: I object.

243 (Objection sustained.)

Q. Were you on the 10th of June on the West Side, on West 25th Street?

(Objection by defendant; overruled.)

Mr. Sharts: The offense that he is charged with was committed on the 5th of June.

The Court: The question is as to the intent and attitude of mind of this witness at a specific time. Now, in cross-examining him as to that, he may go further.

Mr. Sharts: Enter our exception.

Q. The Court rules you may answer the question.

A. I would like to have it repeated.

The Court: You were asked now if you were present at a meeting somewhere on the 10th of June in Cleveland.

Q. On West 25th Street.

A. I would not be sure. I was present at a few meetings over there but I would not say sure I was there on the 10th of June, the date mentioned.

The Court: Your recollection is that you were not there on the 10th of June, is that it?

The Witness: Yes, sir.

Q. Do you know where Market Square is on West 25th Street?

A. Yes, sir.

Q. You are the Charles Baker of Hamilton, Ohio?

A. Yes, sir.

Q. Do you remember of being over there at a meeting with Tom Clifford?

244 —. ——.

Q. And Ruthenberg or Wagenknecht?

A. Yes, sir.

Q. Do you recall now that either one of those gentlemen referred to this resolution at that time?

A. No, sir.

Q. In fact, you never heard of this Cleveland resolution until you came into this room?

A. No, sir.

Q. Did you ever see "Government's Exhibit 2" before?

A. Not until I saw it in the court here.

Q. You never saw it before?

A. No, sir.

Q. I hand you "Government's Exhibit 3" and ask you if you ever saw one of those before?

A. No, sir.

Q. You never saw that?

A. No, sir.

Q. What was it that you said about the newspapers being corrupt in your speech?

A. I quoted a record of the United States Congress, the report of Senator Callaway of Texas. His report claims that the J. P. Morgan financial interests sent out official representatives for the purpose of purchasing up and controlling the editorial policy of the daily press of the United States.

I did not use this expression in my speech: "You get your patriotism from the lying, prostituted press."

I made a speech on the 17th of May in Conneaut, Ohio.

215 Q. On the 17th of May. Did you use this statement in Conneaut ——

Mr. Sharts: I want it understood, of course, that I am entering an exception to all of this line of investigation as to anything said by this defendant where Schue was not present or that occurred at any date subsequent to the date that he is charged with having aided and abetted Mr. Schue.

The Court: As an independent proposition, it might be questioned as to whether his speeches made before the passage of the law or made after the 5th of June, after the commission of the alleged offense, are admissible, but the question here is as to the intent and understanding and purpose of certain acts and speeches said to have been done and made on the 20th of May. Now, in cross-examination, counsel is not limited merely to an inquiry as to what was said at that time, if it is not entirely too remote as bearing upon his intent and behavior. He may ask that question.

(Exception by defendant.)

Q. Did you use this statement in your speech at Conneaut: "You get your patriotism from the lying, prostituted press"?

A. No, sir.

Q. Did you use that statement in substance?

A. No, sir.

Q. Did you use this statement in Cleveland, in substance:

246 "If some of your people here are drafted into the army to fight in this war against your will, there will be people here and an organization here that will be with you"?

A. No, sir.

Q. Did you use that statement at Conneaut?

A. No, sir.

As to the statement that I used in regard to myself here in Cleveland in my speech in regard to my being conscripted, the only place that I referred to myself, as to what my actions would be, was in reply to a question on the Public Square on May 20th by some man standing to my right who asked the question: "What will I do in case of conscription?" I quoted to him an interview that I had with a reporter of one of the Akron papers, to the effect that in case of conscription I would refuse to be conscripted and that I hoped that I had the moral and physical courage at that time to stand the consequence of my refusal to go out and murder people I had never seen.

I did not make the statement on the Public Square that you say Schue testified to that: "He said he would refuse to register, him being of military age" and: "He said he would rather be shot here as a man than be shot in the trenches of Europe as a dog."

I do not recall discussing the subject of registration at all on the Public Square. I never discussed the question of registra-
247 tion. My speech was based on the cause and cure for the war, and I mentioned conscription in reply to a question a man asked me, the only time I spoke on it. The meeting was called as a so-called peace meeting, and I was there discussing the causes and cure for the war. In the course of that meeting I did state to the audience that I would refuse to be conscripted under the circumstances and that I hoped, if I still had my moral courage, to be able to resist. I did not make any explanation of what was necessary to be done by the young men before they could be conscripted.

In that speech I did not make any explanation to them at all as to how this law could be repealed or how the Government could be prevented from acting or carrying this law into effect. I did not explain to them as to how they could resist conscription.

I do not recall the exact testimony of the policeman here in which he testified to what I said in regard to the registration law. I do not remember of saying: "Within my voice there are a good many young men within the age of conscription and that these young men will all be required to register under this law." I did not make any reference to registration at all. There was no question asked me on the subject of registration.

I do not remember in detail the testimony of Police Prosecutor Lind. I did not say in that speech: "Those who refuse to register, that the socialist party would defend and protect." I did not say that in substance. I did not say that the socialist party would not only defend but protect those who failed to register.

The Court: In this St. Louis resolution or program that
248 you say was the program that the socialist party adopted, it says: "We pledge ourselves (omitting some) to the support

of all mass movements in opposition to conscription." What do you understand is meant by a mass movement of your party?

The Witness: A mass movement is a mass demonstration to discuss, to educate, to take up and discuss in detail, any question or circulate petitions for the repealing. I have always determined the question of mass action in the ranks of the socialist movement meant mass demonstrations upon a certain proposition, or to advocate a certain question, such as the mass demonstrations we have had in the Public Square and throughout the city of Cleveland, urging the repeal of the conscription law; which was in harmony with the national declaration. My understanding is that the definition is mass demonstrations such as have been held in the city of Cleveland, where the people work together for the repealing of the law instead of working individually, that they hold large demonstrations together. That is what my interpretation is of mass action.

Redirect examination.

By Mr. Sharts:

Q. You were asked, Mr. Baker, on cross-examination, about some meeting over at Market Square along about June 10th?

The Court: And he testified that he did not remember having attended the meeting.

—. I did not make any different speech at those other meetings than that which I have repeated here. That is my set speech.

249 1:30 p. m.—July 20, 1917.

Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf the defendant ALFRED WAGENKNECHT, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Alfred Wagenknecht. I am secretary of the socialist party of Ohio. I have held that position for seven months. I am 36 years of age. I was born in Germany and came to this country at about the age of a year and a half. My father has citizenship papers and I am a citizen because of his papers. He was naturalized during my minority.

I was present at a meeting on the Public Square on Sunday, May 27. Mr. Hayes and Mr. Ruthenberg also were the speakers. When I arrived at the Public Square, about 2:30, Mr. Hayes was already speaking. At that time the size of the crowd was about 3,000 or a little more.

250 Q. I wish you would narrate now to the jury your recollection of what Mr. Hayes said?

A. At that time——

Q. You are charged with having made a speech immediately

following Mr. Hayes in which you made certain remarks ab
Mr. Hayes' speech, and I wish you would tell the jury now w
you understood by Mr. Hayes' speech and what it was you took
ception to, if anything?

A. Mr. Hayes, when I came to the Square, was talking about
labor movement in New Zealand and Australia. He talked al
that for a good half hour and finally, in ending his speech, he s
that the socialists who would criticise or oppose the laws passed
the Government was a muddle-headed fool to do so, and in
beginning of my speech, I took exception to that. Mr. Hayes a
stated repeatedly, reiterated, that the socialist party was a sm
and insignificant organization, and, of course, being a part of
organization, I took exception to that when I got upon the platfo
because I am rather a booster and wanted to have the audie
realize that we were a growing organization and fairly large.
took exception to what Mr. Hayes' said in his reference to critici
of the Government. I claimed in opening my address, that we
a right to criticise the government.

Q. Go right ahead and tell your understanding of Mr. Hay
speech and what part of it you were taking exception to.

The Court: Probably you had better have him state w
251 Mr. Hayes said and what he said that he took exception
and then, if he wants to offer an explanation as to what
understood, let him do so.

Mr. Sharts: I think he stated what parts it was that he was
ferring to in Mr. Hayes' speech.

A. Yes, I was doing that. I will repeat, if it is necessary at
time, that Mr. Hayes indulged in a criticism of the socialist pa
organization and socialists in general, and for that reason, whe
got upon the platform, I made an attempt to defend the socia
party, being an officer of that organization. I, therefore, told
audience that Mr. Hayes upon this occasion did not seem to re
sent the party organization, that Mr. Hayes had been away fr
the organization quite a while, had not been closely allied with
organization, had been more busy in union labor matters—I m
that reference—and for that reason I thought Mr. Hayes did
express the opinions of our organization upon the platform t
afternoon.

Q. Now, this remark that you said—about Mr. Hayes say
that the socialists who opposed and criticised the Government w
muddle-headed fools—you said that you made some remark w
reference to that?

A. I do not want to lay claim to the exact wording of that,
say that is what I understood he said in substance. He made a
paraging remark against socialists and he used some adjective
criticising them which belittled them—he either said "m
252 dle-headed" or "simple-minded" or something like that.
answer to that was not a direct answer. It was simply
answer in general, namely, I got up there and told the audie

that Mr. Hayes was not speaking for the socialists this afternoon probably because he was too long away from the organization.

Q. Now, I wish you would repeat to the jury, as well as you can, the speech that you made as you got up on the stand after Mr. Hayes?

A. After I was through with my criticism of Mr. Hayes, I went on to indulge in the criticism of the fact that this country had entered the war. I dwelt on that for a little while. The few remarks I made, because they were not so conciliatory toward our government as the remarks of Mr. Hayes, brought forth a good deal of applause. The audience seemed rather to accept the remarks that I made, namely, the remarks which were against our government entering the war, with greater favor than the remarks that Mr. Hayes made, in that he sort of favored the war or did not oppose it as he should as a radical, as a socialist, and so my remarks were interspersed not only with a great deal of applause but with shouts. There was a great deal of shouting going on all the time, and I said these words, to the best of my recollection:

253 I said there were two things that any one can do at any time. You can either obey the laws that are passed or you can go to jail as a consequence for disobeying the laws. I said these things in explanation of my understanding of the right of a majority and a minority at any time and at any place. I am an organizer of the party and have been for years. I recognize the value of organization and its benefits. I know the rights of minorities in an organization. I know the rights of minorities in a government, and, in explaining to my audience the stand which we socialists take upon the war, and our stand upon this question of conscription, I simply wanted to tell them that there were majority and minority positions, namely, that there was a majority position, which was the position of the government at the time and which would keep them out of jail, and that there was a minority position that took the position against the war and would throw them into jail. I reiterated that remark two times because—in fact, I said it three times. The third time I said it was when I was arrested, because I intended to go back to that same matter to discuss it further and explain it further, but my arrest, of course, hindered me doing that.

Q. What was the further explanation that you were beginning?

A. I probably included that in my previous remarks, but I want to reiterate that my intention was to leave my audience with this notion, namely, that the registration law, the conscription law, which had been passed, was a law of the government, that I surmised that, because of the opposition to this war, there might

254 be certain violations of that law, and I wanted to leave my audience with the impression that those violations would entail jail sentences, and even before I was stopped making these remarks I said to my audience that jail sentences would be the result of violation of this law, not in so many words, but in effect. Now, I think that answers it, doesn't it?

Q. State whether or not you made any statements with regard to registration?

A. I mentioned the word "registration." I made certain references to registration, yes, sir.

Q. Do you remember just what language you used?

A. Well, I repeated that. I will repeat it again. I said there was one of two things you can do to my audience. There are one of two things you can do. You can either register and stay out of jail or you can refuse to register and go to jail. Of course, there was a qualification which I want to insert and which I inserted before and which I insert now, namely, the qualification that if you do not register and, as a result, go to jail you violate the law of the government. In other words, I was there telling them of the consequences of violation of this law and of the consequences of obeying the law. I was making an explanation to the audience

Q. Have you given or did you in that speech give any advice on the subject of registration?

A. I never gave any advice upon the subject of registration to any one.

Q. Have you at any time given any one any aid in refusing to register?

A. I never did.

255 At the time I was speaking I observed a stenographer in the crowd. He stood about twenty feet away from me on my right, about.

Q. Explain to the jury his actions, as well as you recall them?

A. If the jury will remember, the typewritten transcript of my speech refers to my mentioning the stenographer. I have always paid particular attention in my meetings to the officials present and the prosecutors present and the stenographers and the federal agents, if I knew them. I knew they were present when they were there. Now, I kept my eyes constantly upon De Woody and the stenographer while I was speaking. I know that the stenographer labored under extreme difficulties in taking his speech, because the crowd was—not boisterous, but enthusiastic—did lots of shouting and lots of applauding, and it was true, as the stenographer himself testified, that at times he had to use Mr. De Woody in order to take his notes; he could not take them himself. Not only that, but I saw him ask Mr. De Woody several times—not once or twice but at least four times that I remember—"What did the speaker say?" I did not hear this distinctly, but I know he asked Mr. De Woody a question and then he stopped writing for two or three sentences before he could catch up again—before he continued his stenographic reports upon his sheet. Now the reason that I know that he asked him this question was because I can read lips fairly well at a distance, and I saw the question formed that was propounded upon his lips:

256 "What did he say?" It is easy to recognize what a man says at most any distance when he says those few simple words.

Q. When you were in the midst of your speech, it has been testified that you were taken from the stand and placed under arrest. I wish you would tell the jury what occurred at that time?

A. I was taken down to the police station and stayed in an outer

office for a long time with some other people and several officers, and after the meeting had adjourned upon the Square, I guess, Mr. Lind and Mr. De Woody came in and took me into another room. I walked into another room and they stood in front of me, with my back turned towards the door and toward a corner in the room, and began ask ng me questions. I was not only asked questions by Chief of Police Rowe and probably by one or two officers in the room. Those questions at first pertained to my place of birth and my citizenship and what I had been doing in late years, and whether I had been to New York lately. They seemed to want to make an attempt to connect me with the German Government. Now, subsequently, they began to ask leading questions relative to my speech, and I got sort of huffed at that because I did not think they had a right to ask me those questions, and turning around I saw that the stenographer was taking everything that I was saying. I did not see him sitting there when I entered the room. The first question they asked me relative to what I had said at my meeting, I frankly told them
257 that the case was not being tried in that room that day, and all I wanted to know was what the charge was against me and wanted my bond set so that I could get out; I had another meeting to attend to.

Q. Were you asked any question there regarding the difference between your position and that of Mr. Hayes?

A. I was asked a question relative to that. In fact, I think they asked me two questions.

Q. Do you remember of any question put to you as follows: Mr. Lind saying to you: "This fellow, what's his name here, kind of upset the dope, didn't he?"

A. I remember that question, and I answered "Yes" to it, meaning, of course, that he criticised the party and upset the meeting.

Q. Do you remember any statement like this from you? "Well, he has been a little away from the party activities and he did not understand the party. He has taken the same stand that the labor unions generally have taken."

A. Yes, I answered him in that way.

Q. Do you remember a question like this put to you by Mr. Lind: "Well, he, in other words, does not believe that the rights of free speech goes as far as you do. Hayes evidently does not believe in advocating the violation of the law and that is where he differs from you?" Was such a question put to you?

A. Yes, a question that was put like that was put to me.

Q. Do you remember what your answer was?

A. I refused to answer.

Q. You refused to answer that question?

258 A. I refused to answer any questions with relation to the speech and my part in the meeting.

Q. You are positive on that subject?

A. I am very positive upon that subject.

Q. At the time that this questioning was being put to you, you say that there were a number of people in the room?

A. Yes, sir; not only were there a number of people in the room,

but questions were being fired at me from three sides, and this answer of "Yes" to that question may have been an answer to another question asked by Chief Rowe or asked by De Woody. I said "Yes" a thousand—not a thousand times—I said "Yes" a dozen times to various questions they asked, about my citizenship, about my place of birth, and where I had been lately, and how many years I had been in the party, and whether I was paid by the party or not, and all of those questions were asked me. They interspersed these questions with questions like these, attempting to make me admit that I had said something at my meeting that I did not say and never intended to say, and this answer of "Yes" undoubtedly was an answer to another question put to me.

I am affiliated with the national socialist party. I am familiar with the proclamation and war program of the socialist party. I was at the convention at which it was adopted. "Defendants' Exhibit No. 1" is the war program of the socialist party. The individual member of the party is always bound in some degree by the party declarations, but an individual in any organization has certain rights of criticising the organization, just the same as the
259 organization itself takes the right to criticise those whom it opposes. As to the position of the socialist party in the matter of opposing by unlawful means any law of the United States, the socialist party is absolutely opposed to opposing anything by unlawful means, and differes in that respect from other organizations which we are sometimes mixed up with.

Cross-examination.

By Mr. Wertz:

When there are stenographers and officers in the audience I keep my eye on them because I want to see what they do and what they are about. I knew they were there in the meeting for the purpose of trying to get evidence against us, and I was very careful that I made no remarks that would lead them to make an arrest or get evidence against me.

When Mr. Farasey was talking to Mr. De Woody I very distinctly interpreted the words "What did he say?" by seeing his lips move. I do not recall what Mr. De Woody answered. He had his face away from me. What I want the jury to understand is that Mr. Farasey did not get all I said over there. His report is not correct in the main. I say it is full of error. I did not repeat my speech verbatim to the jury. I gave the jury to understand what I did say over there in substance. I did not believe on the 27th of May, when I made that speech, and do not believe now that it is the right thing to do for a socialist to refuse to register for conscription under the conscription act. I think that all socialists ought to go and
260 register, after the law has been passed.

I was present at the meeting on the 13th of May in the socialist hall, on a Sunday afternoon. Mr. Ruthenberg was not the presiding officer. I was near the platform. I saw the resolution marked "Government's Exhibit No. 1" before the law was passed. I

did not see that on the 13th day of May. I did not hand it to the young soldier who testified here yesterday, who was a reporter for the "Cleveland Leader," on the afternoon of the 13th and say "That is the resolution we adopted." I do not remember of making a speech in that hall in favor of the adoption of that resolution. The young soldier was absolutely wrong in a good many points he tried to make. As to whether I or Mr. Ruthenberg handed it to him to put in his newspaper, I am absolutely sure I did not hand it to him. I don't know who handed it to him. I am absolutely sure I said nothing about that resolution. My residence is at 1291 Cook Avenue. "Government's Exhibit No. 2," containing "Government's Exhibit No. 1" was sent out by me as a sample of what local Cleveland was doing before the law was passed.

There was a bundle of these papers (Government's Exhibit No. 2) sent by me to East Palestine, Ohio, to a man by the name of A. A. Hennacy. I don't know whether the Government held them up or the postmaster refused to deliver them to Hennacy. I know that Hennacy did not get the literature. "Government's Exhibit No. 4" is a copy of the letter I sent to the postmaster at East Palestine.

261 I know who Hennacy is. I know he was convicted of opposing conscription and I know his appeal is pending.

262 Q. And I will ask you whether or not this is correct in this transcript: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the Socialist Party of the United States, and, not agreeing with the official action of the Socialist Party of the United States, we must say that this afternoon Max Hayes does not speak for the Socialist Party." Is that correct?

A. That is correct, in substance, when referring directly to the question of conscription.

Q. Referring to the question of conscription, then this is correct, is it, that Max Hayes does not represent the official action of the Socialist Party of the United States on the question of conscription? Now then, what was Max Hayes' attitude on the question of conscription?

A. Max Hayes' attitude upon the question of conscription was about the same as the American Federation of Labor took namely, that after the government has once spoken, no more should be said about the laws passed. That was my interpretation of Max Hayes' attitude as a state organizer.

Q. Is it not a fact that Max Hayes said they should go and register and comply with this law until Congress repealed that law?

A. He said that and other things about conscription.

Q. And isn't that the thing you were criticising Max Hayes for when you say that the Socialist Party has taken a definite and decided stand upon the matter of registration for conscription

263 and that Max Hayes does not represent the Socialist Party of the United States on that subject?

A. Are the words "registration for conscription *for conscription*" in that?

Q. Yes.

A. I did not say "registration for conscription."

Q. "The Socialist Party has taken a very definite and decided stand upon this matter of registration for conscription.

A. I did not say "registration for conscription."

Q. Then the stenographer put that in there and you never uttered it?

A. No, I don't remember of uttering it. I made it my particular aim to distinguish anything the audience might get upon these two words, namely, registration and conscription, and I distinguished between the two all through my speech.

Q. Is this correctly reported by the stenographer: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, 'The time has come when we, through organized power and strength, must say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'"?

264 A. Yes, but that was not in reference to conscription or registration. It was a general statement.

"Q. Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, understand, in this movement for working class liberty, but when somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand, and so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription."?

A. Before that remark was made, I remember particularly telling the audience that governments had powers in certain instances in respect to the enforcement of laws, and then I said what you read to me in reference to the power that the government had in enforcing laws, and that those who violate the laws must take jail sentences.

Q. I ask you now, didn't you make that statement in reference to compliance or non-compliance with conscription and registration for conscription?

A. I made it a direct reference as applying to conscription, but nothing as applying to registration.

Q. If you agreed with the conscription act—were you ever informed that there was any jail sentence for refusing to be conscripted?

265 A. Knew of the jail sentence for refusing to be conscripted when the law was passed, when I read it in the newspapers.

Q. Don't you know as a matter of fact that there isn't any imprisonment for not complying with the draft, after you are drawn, except the fact that the soldiers come and take you away?

A. I know of nothing like that in the law. In fact, I don't believe it is true.

Q. Don't you know that the only sentence provided for in this so-

called conscription law is the sentence provided for non-registration under that law?

A. I think the direct contrary is the truth. I think there are other sentences provided in the law.

Q. There is one in regard to liquor and immoral women around the camp grounds, but outside of that do you know of any other?

A. You ask me that question?

Q. Yes.

A. I do not recall right now.

Q. Now, you read this law, didn't you?

A. I read it when it was passed, upon the day it was passed.

Q. You were thoroughly familiar with all of the provisions of it?

A. Fairly familiar, not thoroughly. I am no lawyer. I read it as one would read a newspaper article.

266 Q. What was the purpose of your reading that act?

A. As a matter of news, to inform myself.

Q. I will ask you whether or not you read it in order to see how close you could come to complying with that law and not comply with it and still not have the policeman pick you up?

A. Certainly not. I read it as a citizen would read it, in order not to violate the law.

Q. Do I understand you correct, that you said this: "And so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription."? Is that correct?

A. Is that continued from your recent utterance?

Q. Yes.

A. I want to say that I refuse to be placed in the wrong light before this jury. I am not going to answer "Yes" or "No" to certain extracts of my speech because one sentence conforms to another and there are a good many sentences I said which are not there, and I am not going to answer "Yes" or "No" to certain extracts which you may make in order to try to incriminate me.

Q. I will read it all then.

The Court: When the District Attorney puts to you a question and asks you if upon that occasion you made a statement
267 of that kind, it is your duty to answer the question. If you do not remember or if you are unable to answer it as put to you, it is your privilege to say so.

Q. I understand you to say that all that you said in your speech over there was against conscription, that it was not against the question of registration or not registering?

A. My speech over there was against the conscription law, in an attempt to raise sentiment against it so that we may have a chance to repeal it.

Q. And you advised no one there to refuse to register?

A. I certainly did not.

Q. You did not discuss the question of registration?

A. I did.

Q. How far did you discuss it?

A. I discussed, in explaining it, that if they did not register they would have to take jail sentences.

Q. And that is as far as you went?

A. That is as far as I went.

Q. I will read on now, continuing from where I read a few moments ago: "You can either register and run a chance of being drafted or you can refuse to register and go to jail. Applause and cries of "Jail, Jail." You have a right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has a right to say that you
268 shall register and go to murder. The question is, of course—you may applaud here this afternoon—but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? Any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register." Did you say that?

A. No, sir. The style of that is not at all the style that I would use in making a remark of that kind, of that nature.

The Court: Your answer is that you did not state that?

The Witness: I did not state that as he read it, no, sir: not under any circumstances did I say what he read.

Q. Did you say it in substance?

A. Not in meaning.

Q. Did you say it in substance?

A. Not in meaning, I answered.

Q. Then Mr. Farasey fixed up this typewritten record, did he?

269 A. I claim he did not get a record when I was speaking on account of the great moving about of the audience.

Q. If he did not get it all, and you did not say that, then Farasey must have put this in here?

A. If he did not get it all, he fixed it up, what he did not get, later.

Q. You want the jury to understand that this stenographer who was on the witness stand here fixed up this record with something that you did not say in this speech over there on the Public Square?

A. I want the jury to understand Farasey himself testified that he took the notes with very great difficulty, and I know he did, and that is what I want the jury to understand.

Mr. Wertz: I would like to have an answer to my question.

The Witness: I think that is an answer. I want the jury to

understand, in other words, that Mr. Farasey could not take the notes in the position he was in and have those notes come before this court as accurate testimony of what I said.

Mr. Wertz: I would like to have an answer to the question.

The Court: I think the witness has answered that he did not say in substance, or at least in meaning, what Mr. Farasey has transcribed as his statement. I think he has answered the question.

Q. You also say that you did not say to Mr. Lind over
270 there in the jail that the way you differed from Hayes was because Hayes believed in complying with the law and you believed in violating the law?

A. I never answered "Yes" to that question. I have got too much sense to answer "Yes" to such a question before a prosecutor or before a Federal agent.

Q. Now, do you know what you were arrested for?

A. When?

Q. When they pulled you off of the block over there, what you were doing when they pulled you off?

A. I never knew what I was arrested for; I did not know until an hour or an hour and a half afterwards, when they placed a charge of disorderly conduct against me and being with a disorderly assemblage.

Q. Everything was peaceable up to the time of your arrest?

A. Except for the enthusiasm and jostling about of the audience.

Q. And at the time of your arrest there was a near riot and all excitement?

A. No, sir, just enthusiasm, applause and shouting.

Q. The crowd followed you?

A. That was after the arrest.

Q. These circulars similar to Government's Exhibit No. 2—this is marked "Government's Exhibit No. 27" which was used in another case——

271 Mr. Sharts: I want to interpose my objection to the introduction of this evidence.

Q. Is that the package you sent out from 1291 Cook Avenue, Lakewood, Ohio?

The Court: You object to that question being asked?

Mr. Sharts: I object to the introduction of any such evidence.

The Court: I will overrule the objection. As I understand it, the question is whether that is a package of circulars that he sent out?

Mr. Wertz: Yes.

Mr. Sharts: Enter our exception.

Q. Is that the one?

A. I cannot state whether that is the one or not.

Q. Come down and examine it.

A. An examination would not do me any good. I send out hundreds of packages a week over from the state office and I am sure I don't know whether this is mine or not.

The Court: To whom is that package addressed?
Mr. Wertz: The package is addressed to Ammon A. Hennacy.
The Court: Is the address in writing?
Mr. Wertz: Typewriting, "General Delivery, East Palestine, Ohio," and on the corner of that address is "The Socialist Party, 1291 Cook Avenue, Lakewood, Ohio."

Q. And you sent a letter to the postmaster——

272 The Court: He examined it, but I do not think he answered your question whether that package had been sent by him to Hennacy at that address.
The Witness: Packages like that and similar, probably that, were sent by me to Mr. Hennacy before the conscription law was passed.

Q. Do you remember when the last one of these packages was sent out?
A. I should judge the first half of May.
Q. The first half of May?
A. Yes.
Q. Now, referring again to Government's Exhibit No. 4, you say here: "Lakewood, Ohio, May 25, 1917. Postmaster, East Palestine, Ohio. Dear Sir: About a week ago two packages of printed matter were addressed to the East Palestine Post Office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened." Does that recall to your mind that that package might have been sent out after the 18th day of May, 1917?
A. Under no circumstances. The letter is dated the 25th, and I stated "about a week ago." It was probably ten days ago that I sent that package to Mr. Hennacy.

Mr. Sharts: Enter an exception to all these questions.
The Court: All right.

Q. Why are you so positive that you sent none out after the conscription law was passed?
273 A. Because I refused to fill orders for hundreds of thousands of those leaflets, after the conscription law was passed, as the State Secretary of the Socialist Party of Ohio.
Q. You sent them out right up to the time it was passed?
A. I did not send them out up to some days before the time it was passed.
Q. About a week before the 25th would make the 18th day of May, 1917, if your calculation is correct here, would it not?
A. I say "about a week." I do not say "a week." It may have been ten or twelve days.
Q. So it may have been a day or two more than a week, one way or the other?
A. It would not be less than a week, I am positive of that.
Q. Do you know as a matter of fact that that package did not reach the postmaster at East Palestine until the morning of the 22nd day of May?

A. I don't know when it reached there. By the looks of it, I would not be surprised if it never had reached there.

Q. Now, if you were present at that meeting of the Socialist Party out at the hall on the 13th, Sunday afternoon, when that resolution was adopted "And recommend to and urge all members of the Party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in
274 their refusal to become the victims of the ruling class," I will ask you if you had any plans or made any plans or any arrangements to render any of these parties financial or moral support in their refusal to register?

A. Since when? Since the law was passed?

Q. Yes.

A. Since they have been arrested?

Q. Yes.

A. The state organization has so far not paid out one cent for the support of anybody who has refused to register.

Q. Of course, if the law did not pass, there would be no occasion for them to refuse to register, would there?

A. I suppose not.

Q. This letter says: "Lakewood, Ohio, May 25, 1917. Post Master, East Palestine, Ohio. Dear Sir: About a week ago two packages of printed matter were addressed to the East Palestine post office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened. I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio. If this is not done, and if by tracing we can find that you interfered with the delivery of this second package to the addressee, we shall immediately refer the case to our attorney and institute the proper proceedings. Yours respectfully, A. Wagenknecht, State Sec-
275 retary. Sufficient postage for forwarding the package is enclosed." Is that a correct copy of your letter?

A. That is about correct, yes, sir.

Q. Now then, if, as you say, you sent none of this literature out after the conscription law was passed on the 18th day of May, 1917, why do you *to* say to this postmaster under date of May 25, 1917: "I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio?

A. Because Mr. Hennacy was sent a good deal of literature from our office, not only this kind but also books on socialism, and the entire reference in that letter may be to books on socialism rather than to this literature.

Q. Hennacy was distributing this literature, wasn't he?

A. And he was selling socialist books.

Q. And you sent him this literature to be distributed, didn't you?

A. Before the registration law was passed.

Q. And you wrote him on the 25th day of May "I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio," didn't you?

A. That does not prove it refers to this package.
Q. I did not ask you that. Didn't you so write him?
A. I wrote him that, yes, to the post master.

276 Redirect examination.

By Mr. Sharts:

As to my understanding at that meeting of May 13th, before the law was passed, about whether or not it was to be a compulsory registration, and being an officer of the party, I tried to make it my particular business to find out the penalties for not registering, because the socialists at headquarters and throughout the state were asking me for information. Up to the 13th of May I was laboring under the understanding that it would be a voluntary registration, because President Wilson himself claimed in one of his proclamations that this entire act of conscription was a voluntary act, and so I labored under the opinion that this was a voluntary registration. I thought you could register or could not register, just as you pleased. I sent a telegram to our socialist congressman Meyer London, asking him about whether or not a penalty was attached for failing to register. Undoubtedly there is a transcript of this telegram at the Western Union office which proves it. I did not receive an answer from him until I received a copy of the law, and I read of it in the newspapers, and at that time I was made aware of the fact that there was a penalty attached to the law and if you failed to register the penalty was that you would be put in jail for a year or less. From the time I discovered that there was a penalty attached for a refusal to register I have not sent out or had anything to do with the resolution which has been read to me here. (Referring to "Government Ex-
277 hibit No. 1"). We had a conference at socialist headquarters in Cleveland of the executive committee together with some members of the state executive committee. We discussed the matter fully and the result of that conference was that no literature be distributed and sent out subsequent to the passage of this law, and this conference was held shortly before the law was passed. At that conference I think Tom Clifford, Mr. Ruthenberg, Mr. Cheeel and Mr. Bronstrup were there and propably two or three others. Mr. Clifford is state chairman and Mr. Ruthenberg is national committeeman, and these are the state officers who were present at that conference. As to whether I had a conference with Mr. Ruthenberg previous to the meeting on the Public Square on May 20th, I talked to him very often during the week. It was generally understood before we went to the meeting, and all meetings after the law was passed, that the tenor of all the speeches be within the law. As to the position of the socialist party with regard to obedience or disobedience *to* the law, the social'st party is a political organization which seeks to gain power through the ballot box and seeks to institute a different form of government by peaceful and lawful means. The letter which Mr. Wertz read which I sent to the postmaster is a form letter. Since *the* war has been

declared by this government the socialist party has had very much trouble with its mail, not only its second and third class mail buts its first class mail. Letters have been opened. We do not get many letters, and the proof of it is on the table here. There is
278 copies of letters that are in the hands of the prosecution which went through first class mail and has been opened and brought into court. Now, this form letter has been sent out in very many instances to postmasters who have had the temerity to hold up our mail, and I sent this letter to the postmaster at East Palestine just as a matter of form, because I had heard, directly or indirectly, that some literature or some mail of some kind was held up by the East Palestine postmaster. At the time I sent that letter, I knew it had something to do with something I sent to Mr. Hennacy, but whether it was this package or whether it was a package of our socialist pamphlets and literature, which we sell at retail in the field, I do not know.

Q. Now in regard to your remark during your speech about those who failed to register would go to jail and those who did register would eat gravel or something that way, I wish you would explain to the jury in what sense you were conveying that statement to the audience?

A. That I would like to explain, yes. I did not use the word "registration," however. Even the transcript will show that I made no reference to registration. I meant that pioneers in a movement that was a radical movement and that sought to gain power always were subject to prosecution by those who were in power, that history proves that, and I tried to attempt to show the audience that when a movement like the socialist party movement attempted to instigate opposition to the war and attempted to repeal the conscription law, the parties in power prosecuted the socialist party
279 and threw some people in jail. In fact, we have had a good many socialists jailed for simply circulating the petitions to repeal the conscription law, thousands of which have been sent out by me throughout the state. We have had socialists arrested for circulating a petition to repeal the conscription law, and that is what I referred to, and that reference was made particularly to pioneers, pioneers in our movement, who were arrested. Now then, there is another remark in the transcript which I would like to explain, and that is the remark which reads: "Now, friends, you have the right to go to jail." All of my remarks were not secured at that time. That remark was made in a rather jocular manner. I was joking with the crowd. They were all laughing, and I was simply saying to them, as I would to a man next to me: "Of course, friend, you have a right to go to jail. If you feel like going to jail, go." It was not an inducement to him to go to jail. I was simply talking with him and saying that the jail awaits him if he attempts to break the law.

Recross-examination.

By Mr. Wertz:

I am sure I was over there on this particular Sunday afternoon when the stenographer made this account of my speech.

As to whether, because I am pioneering that is the reason I keep my eye on the policeman, that may be one reason. We have been arrested for a good many things in our career which had
280 no basis in any fact or had no reason to find any cause for prosecution.

I do not know whether or not the Government opened my mail in order to get this letter which I wrote to the postmaster at East Palestine, Ohio, directing him to forward these circulars to Mr. Hennacy. I sent that letter to the postmaster. I have no proof that the government did not open anything in this case to get evidence on me. I have proof that they did in this package here. (Referring to "Government's Exhibit No. 27"). I account for our trouble in getting our literature through the United States mail through the officiousness of the small postmasters throughout the state. I have no direct evidence of any of our mail being held up here in the city of Cleveland, or any of these circulars. The local socialist paper was held up one or two weeks. As to my statement that all over the United States our publications were being held up, they were being held up for a week or two and then a committee visited Washington and the result has been that all of them are now again publishing and using the mails.

281 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf the defendant CHARLES E. RUTHENBERG, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Charles E. Ruthenberg. I am at present secretary of the socialist party of Cleveland. During the past three years I have been purchasing agent for the Printz-Biederman Company at Cleveland. Before that I was engaged as a salesman with the McCray Refrigerator Company, Cleveland. I am thirty-five years old. I was born in Cleveland and have lived all of my life in Cleveland. I have for the last eight and one-half years been secretary and organizer of the socialist party. I have three times been a candidate for mayor, a candidate for governor, a candidate for United States senator and its candidate for Congress in the 20th District.

I have not at any time aided and abetted anyone not to register. I was present at a meeting in socialist headquarters on May 13th. There was a resolution with regard to conscription passed at the meeting of May 13th, but it was not at the time of the passage of such resolution a legal meeting of the socialist party. The meeting adopted a resolution urging, recommending, persons not to register.

My understanding at the time this resolution was passed, with regard to the method of registration, was based upon the proclamation of President Wilson that the conscription would be a vol-
282 untary offering of the youth of the nation, of themselves, for the army. I was not familiar with any provision for a penalty for not registering. There was no action of the socialist party of Cleveland in reference to Exhibit No. 2 of the Government after the law was passed. The party absolutely took no action and was not concerned with matter in any way after the passage of the conscription law. There was a conference, with reference to that resolution, of the speakers preceding the meetings of May 20th and May 27th. After the conference I made a speech on May 20th on the Public Square, following Mr. Baker. At that meeting I made no reference to the position of the socialist party on the matter of registration. I mentioned the fact that there was to be a registration for conscription in my speech and then I discussed what conscription meant to the youth of the nation.

Mr. Wertz: When was this?

Mr. Sharts: This was on May 20th.

Mr. Wertz: There was no evidence offered that we made any charge against him on May 20th. This is confined to May 27th.

Mr. Sharts: Mr. Schue testified that he had a recollection, not by any means clear, it is true, that Mr. Ruthenberg followed Mr. Baker on May 20th and spoke.

The Court: Didn't he not also say that he did not listen
283 to Mr. Ruthenberg?

Mr. Sharts: But, if Your Honor please, it was part of the meeting of that day. It was a part of the program in which Mr. Baker took part, and I claimed that it would be competent, if on no other ground, because it was following out a fixed program of which Mr. Baker was only a part.

The Court: If my recollection is right, Mr. Schue testified, as I recall, that he left at the time Mr. Baker finished speaking and did not hear Mr. Ruthenberg's speech, Mr. Ruthenberg's speech being subsequent to that of Mr. Baker. I will hold that it is not competent, as to the 20th, you understand.

Mr. Sharts: Enter our exceptions.

Q. And did you hear Mr. Baker's speech on May 20th?

A. I did.

Q. I wish you would state to the jury, as well as you can, briefly, on what subject Mr. Baker spoke?

A. Mr. Baker began with an examination of the forces in present day society which brought about the concentration of wealth under the present industrial system. He shows that, as the result of the existing industrial system, wealth was gradually concentrated in the hands of a very small class of society, which became the dominant and ruling class in society. That this class made its profits through the exploitation of the workers in shops and
284 factories. That because of this exploitation of the working class the workers themselves were not able to buy back the

goods which they produced through their labor power, through their brain and muscle——

Q. I believe you can set forth the substance of his speech briefly.

A. That is what I was doing.

Q. So as to come to the portion about conscription.

A. And he continued along that line, showing the forces that brought war into the world, showing that war, as it existed in Europe, was the inevitable result of a system of producing wealth for profits. He continued with showing the forces in Europe which had brought about the war, and showed that those same forces, the interests of the capitalist class, making profits, were the cause of the present war in which this nation was involved. Then he proceeded to a discussion of the conscription law, showing that the Government of this country——

The Court: On the discussion of the conscription law, it probably would be desirable for you to state what he said as near as you can.

The Witness: I am doing that.

A. (Continuing:) He proceeded to the discussion of the conscription law, and said the following: That the Government of this country, through the influence of the ruling class, has forced
285 this nation into a war which has been found to be so unpopular among the people that it has been unable to recruit the soldiers to fight that war without resorting to conscription. And so he said we are now in danger of being sent to the trenches of Europe against our will and wishes. We are in danger of being taken away from our homes and sent to do the work of the ruling class of this country, to fight for its profits, to kill human beings, because men desire to make money, whether we desire to go or not. And at that point he was asked by some one in the audience: "What shall we do about it?" A question to that effect, and he went to relate an interview which he had with a reporter at Akron which, in substance, was as follows: He said the reporter asked him why he was not wearing a flag in his coat lapel, and he replied and asked her whether she wore such a flag before the war was declared, and she said: "No." "Well," he answered, "I believe in Old Glory. I am proud of Old Glory," he said. "I honor it as every man should honor it, but I do not honor it because it stands now for war. I would rather wear it in time of peace, when it stands for helpfulness, stands for making the lives of human beings better, than to wear it only in time of war, when it stands for killing human beings." And the reporter asked him what he would do if after registration he was conscripted, and he replied that he hoped that if he was taken against his will and wishes to be sent out of
286 this nation to kill other human beings of other countries, with whom he had no quarrel, toward whom there was no enmity in his heart, toward whom he would rather hold out the hand of comradeship and friendship, and work with them for a better world—if he was taken against his will, that he hoped he would have the courage at that time rather to be stood against a stone wall

and riddled with bullets than to do this work of the ruling class. That, in substance, was his speech.

Q. What reference, if any, was made by him to registration?

A. Only mentioning the fact in his speech that registration was to take place, and that the youths were to be conscripted for this work of killing human beings.

Q. And did you hear him advise any one with regard to registration?

A. I did not.

Q. I will ask you now if you were present at the meeting of May 27th?

A. I was.

Q. Do you recall the speakers who preceded you?

A. Yes.

Q. Do you remember who was the first one who spoke?

A. I arrived at the meeting during a speech being made by Max Hayes. Mr. Wagenknecht followed Max Hayes and I was the final speaker at the meeting.

Q. Do you recall the substance of Max Hayes' speech?

A. Yes. I can state it.

287 Q. At least that part of it with reference to which Mr. Wagenknecht spoke afterwards?

A. I can sum it up in a very few words. Mr. Hayes spoke at length in regard to the conditions under the capitalist system, through which the workers were robbed and exploited and compelled to suffer misery and hardships, and then proceeded to a discussion of the forces which brought about the war in Europe, and talked in regard to the present war, saying that it was part of this general force in society which brought these evil conditions into existence. He then dwelt upon what the workers of Australia had done, and showed that in Australia the government had been compelled to submit the conscription law to a vote of the people and that the Australian workers, who controlled the government through the Labor Party, had voted down the conscription law when they had a chance to vote upon it, and then he showed that the Government of the United States was not so democratic as Australia; that the people of this country were going to be compelled to serve in a war without having had a voice in deciding whether there should be such a conscription law on the statute book. He showed that the forces in control of this country were autocratic, because they placed such a law on the statute books against all the spirit of the history of this country, and in spite of the will and wishes of the people expressed at the last election. "But," he said, "It is the law. What can we do? We

288 have not had sense enough," he said, "to organize our power yet. We have not had sense enough to get together to take control of this government for ourselves, so we will have to obey the law while it is in existence," but he urged that we get together, that we organize, for the purpose of taking that law off of the statute books at the earliest possible moment.

Q. When Mr. Wagenknecht——

A. By the way, there is another point which I wish to add to my

statement of Mr. Hayes' speech, which is vital. I referred to it in my own speech. Mr. Hayes in his speech, in saying that the people had not had sense enough to organize, repeatedly referred to the Socialist Party as an insignificant minority. He referred to the Socialist Party as something weak, something which was not very strong, which had not thus far played a great part in present day society, in a spirit which grated upon my mind, and no doubt upon others in the audience.

Q. Now, when Mr. Hayes had finished, I believe Mr. Wagenknecht was the next one?

A. Yes, sir.

Q. Do you recall the incidents of Mr. Wagenknecht's speech and arrest?

A. Yes.

Q. I wish you would state the substance of Mr. Wagenknecht's speech.

289 A. Mr. Wagenknecht began with a reference to the speech of Mr. Hayes, referring to the fact that the spirit of his speech was a minimization of the power of the Socialist Party, of the position of the Socialist Party, and that he resented that, that Mr. Hayes had not been in touch with the Socialist Party of recent years, and that, therefore, he was not thoroughly familiar with the position and activities of the Socialist Party, which no doubt was the cause of his speaking in the slighting manner of the socialist movement at the present time. He then went into a discussion of the war, showing briefly that it was a capitalist war, and then turned to the conscription law, and pointed out that a conscription law had been passed and was on the statute books, and stated that this law provided that a man must either register or go to jail.

Q. Was it at that time he was arrested?

A. During the latter part of the remarks he was taken from the stand or platform.

Q. During the time Mr. Wagenknecht was speaking, did you hear him give any advice to anyone as to whether he should register or not?

A. I did not.

Q. You have heard the stenographic notes of the young gentleman who testified, Farasey? As those notes were read, I will ask you whether or not that impressed you as a correct rendering of the speech of Mr. Wagenknecht?

290 A. It did not so impress me, and I know of my personal knowledge that the stenographer asked people in the audience, "What did he say?"

Q. You observed the stenographer while Mr. Wagenknecht was speaking?

A. Yes, sir.

Q. Did you notice where he stood?

A. He stood at the right of the speaker, about twenty feet away from the Stone platform.

Q. Did you notice whether he was in company with others or alone?

A. There were people around him. I don't know who they were.

Q. You say that you have personal knowledge of the fact that he was asking others?

A. I have seen him repeatedly during these meetings turn to a person next to him and ask—at least, the entire action indicated that he asked one question repeatedly. When a man is writing and turns and speaks and asks a question, the indication was that he asked: "What did he say?" and he got some sort of reply.

Q. After Mr. Waggenknecht's arrest, I believe, you took the stand?

A. I did.

Q. Who was it that introduced you?

A. Mr. Hitchcock.

Q. And you then made a speech?

291 A. I did.

Q. I wish now you would state to the jury—by the way, that speech, it has been testified by Mr. Farasey, he took down your speech and you heard those notes read in court?

A. Yes.

Q. I will ask you whether or not that impressed you as a correct rendering of your speech?

A. It was not. I can state one thing in regard to that speech that I know was absolutely incorrect. He put in my mouth, in connection with an utterance, saying that I said that we would have to do the "base, dirty work of the ruling class." Now, that word "dirty" in that sense is one that I would never use, that when he read it — set my teeth on edge, and made a shudder go through my entire body, because it was so repulsive to me in that connection. It is a word that I would never use in any speech I make because I do not use that kind of language.

Q. I will ask you now, Mr. Ruthenberg, to give to the jury as well as you can recall it, a correct restatement of your speech.

A. The speech which I have made, of course, was one which I had worked out mentally, and the various propositions contained in it were something I am thoroughly familiar with, so that I believe, while I cannot state each word exactly, I can state that speech in its general meaning as it was delivered on that day. I began it

292 this way: Comrades and friends: We have here this afternoon witnessed an incident such as has happened in Russia on many occasions. No doubt, under the reign of the Czar there have been many times when attempts have been made to stop the telling of the truth. There have been many occasions when those who are the servants of the ruling class in society have tried to prevent those who were fighting for the liberties of the people from uttering the things that they desired to state, and this afternoon we have here in this United States witnessed a thing which we have so often condemned in Russia, the land of darkness and dread things. But, in spite of this thing having taken place, I will proceed with my speech just as I proposed to make it to you before this thing happened. I am going to present to you my ideas, my thoughts, in regard to the present war and the things which the people of this country face at the present time. I am not going to appeal to your emotions, I am go-

ing to submit the facts for your consideration. I do not believe in appealing to your sentiments. I want you to consider the truth as men and women, thinking men and women, who wish to make this world a better place to live in for all of mankind.

A few days ago there was a call issued by certain workers for a conference in Stockholm, to be held for the purpose of endeavoring to find a common basis for ending this horrible war, for ending
293 this thing which has cost the lives of millions of human beings, and through which other millions have been crippled and maimed and smashed beyond recognition as human beings—a conference was called by certain people to try to bring an end to this war. I am adverting to this thing now because it shows us how much truth there is in the statement that this nation is fighting a war for democracy. This conference was called by the workers of Belgium, the workers of Denmark, the workers of Norway and Sweden, to hold an international Socialist Conference, to find a basis for terms of peace and end this bloodshed and murder of human beings. All of these nations—the Belgian workers, the workers of France and of Germany and of Austria and Russia and England, all of the countries of Europe—yes, even Turkey and Bulgaria—are sending their delegates to this conference, to see if they cannot end this war, and this awful murder of men and women, but there is one country which will not be represented at that conference. That is a country which is claiming that it is carrying on a fight for democracy. That is these United States, which has refused passports to a conference which has as its purpose to bring peace into the world. That is the best answer to the question whether we are fighting a war for democracy or not.

My friends and comrades, this is not a war for democracy. This is not a war for freedom. It is not a war for the liberties of
294 mankind. It is a war to secure the investments and the profits of the ruling class of this country, and I am going to show that to you. I am going to give you the facts so that you can judge for yourselves. Prior to the election of last November, from the date of the St. Louis convention of the Democratic Party to the November election, the spokesmen of this Democratic Party went up and *and* down this country, from the Atlantic to the Pacific, from the Canadian border to the Gulf of Mexico, and they appealed to us to support and re-elect the present administration, to put them back into office, and what did they tell us was the reason why we should re-elect the President and Congress? What did they offer as their chief ground for re-election to their places in the government of this country? You know as well as I know that the chief appeal of the Democratic Party during this campaign was the cry: "He kept us out of war." He kept us out of this horrible thing in Europe, this chasm, this shambles, in which all that is good in our civilization is disappearing, in which all the kindness and humanity and the spirit of brotherhood which has grown up in the world is being wiped out of existence. The Democratic Party asked us to re-elect its candidates for President and its Congress because we knew of this horrible thing, because we knew of this bloodshed, this crippling and maiming of human beings, and because we had turned back from it aghast,

295 and cried out in horror at this awful thing that was happening in Europe, and they said: "We kept you out of this war, so put us back into office." And what do they say now? They say now that they kept us out of a war for democracy and freedom. My friends, judge for yourselves. Judge yourselves whether what they said before election is the truth about this matter or what they say now is the truth about this matter. I am here to say to you that what they said before is the truth about the matter, and that the only reason we are in this war now is because it is to the interests of the ruling class, the capitalistic class, this country to have us in this war, and I am going to show it to you. I am going to prove it to you. I am going to submit facts to you to prove this assertion.

In January of this year, according to the reports of this ruling class itself, there was a trade balance of five billion dollars in favor of the American capitalist class. In other words, they had exported to Europe, they had sent out of this country of the wealth which we produced, which the sweat and labor of the people of this country brought into existence. They had sent out of this nation five billion dollars more than had come back into this country, and for this they had received gold, they had received stocks and bonds, they
296 had received other things in exchange, and in the Spring of this year this enormous traffic—and I say to you that never in the history of the world has there been a class which deserves more condemnation, which deserves more criticism, than the American capitalist class which saw in this struggle in Europe, in this killing and maiming and murdering, this bloodshed, this destruction, this wrecking of all that is good and beautiful—which saw in this thing only an opportunity for profit—I say to you that never in the world has there been a class which deserves more condemnation than the American capitalist class, which desired nothing more than to make profits out of the murder of their fellow human beings, and, when they saw their profits in danger through the fact that the German submarine menace became more serious, they found it necessary to use their power over the government of this country to hurl this nation into that war, not to fight for democracy, not to fight for freedom, but to fight for their profits, to fight for the loans which Morgan & Company and their fellow capitalists had made to the Allies. They were ready and willing to send the youth of this nation into this horrible nightmare of murder, to kill and to be killed, in order that their profits might be saved. That, my friends, is the cause of this war.

And they have done more than that. They have gone farther than that in this thing. For many years—yes, decades of time—it
297 has been the spirit of this nation that compulsory military service was only possible in an autocratic country. We have looked across the waters and said that the people of Germany cannot be free because they are conscripted and forced to fight the battles of the ruling class. We have said the people of France and of Italy and of Russia cannot be a free nation as this country is a free nation, because they can be compelled to shoulder a gun and murder their fellow human beings, and today the government which has appealed

to us because it kept us out of war, from which we have heard many beautiful platitudes about democracy, has put this most reactionary and autocratic law, the conscription law on the books of this country.

My friends, I want to give you a picture of what conscription means.

The Court: Will it disturb you if we suspend at this point?

The Witness: It will not.

The Court: You will resume at the point where you have stopped. We will take a recess.

(Recess.)

The Court: You may resume your testimony at the point where you left off.

A. (Continuing:) I want to give you this picture by illustrating it through a story which has come to us from Europe, from
298 one of the countries which is now involved in this war. A young man coming from a humble home had gone to this war, gone out into the struggle, into the bloodshed, into all that makes up this horrible thing we call war, and he had done what the newspapers said was a heroic deed.

A. (Continuing:) This young man, who had done what was called a heroic deed, was returning from the trenches to his home city on a furlough.

The Court: Of course, you will understand that you are not expected to make a new or different speech, but to repeat, as exactly as you can, the language you used on that occasion. You understand that?

The Witness: I am making, as I recollect, the speech I made on May 27th.

A. (Continuing:) This young man, returning to his home from the trenches, after having done what was called by the newspapers a heroic deed, namely, having killed in a struggle, single handed, three of his enemies, was to be welcomed at home by a crowd at the depot, by music and by all of the other things that go to make up the sham patriotism of murder and warfare. And the people waited for him at the station. The train came in and they looked for him to welcome him with glad acclaim, but he was not to be
299 found. He did not come from this train. He was not seen to leave it. And the audience, the people that assembled there, did not find him to welcome him as they expected. But he had himself left the train at a station on the outskirts and by the back alleys reached his home, where he found his mother—his mother to whom he went first, and she, too, was about to honor him, about to state her gladness for his heroic deeds, state how much she admired his courage, and when she started to do that the young man laid his head down in her lap and put his face on his hands and began to weep and said, "Mother, I cannot think of it. I cannot think of this horrible thing I have done. I cannot think of the look of that young man's face,—a young man just as I, a young man who might have been my comrade and friend, a young man who might have been a happiness and joy to me—when I put that

bayonet in him and took his life from him. Do not talk to me about the glory of the deed. Do not talk to me about the bravery of the deed. It will be the curse of my life for the rest of my days that I murdered a fellow, human being thus." That is what conscription means to the youth of this nation. That is what it means to them to be taken from their homes without their consent and sent out to
the trenches to murder and be murdered for the profits of
300 the ruling class of this country. That is what the government of this nation has done in order to put this statute on these law books of this country—a statute which, in my opinion, is entirely contrary to the fundamental law of this country, the constitution of the United States.

If law means anything, if words mean anything, when the constitution says that there shall be no involuntary servitude in this nation except as a punishment for crime, it forbids specifically taking a man against his will and making him fight and murder his fellow human beings. Yes, one of the foremost statesmen in the history of this country, Daniel Webster, as long ago as 1814, when the Congress of the United States was considering the passage of a conscription law, arose in the House of Representatives of this land and denounced it as contrary to the constitution of this country, saying, "Where do you find it written in this document, this right of the government to take the young men of the country out of their homes and send them forth in any war which the wickedness or folly of the government may declare? Where has this power lain hidden which now for the first time comes forth in this baleful aspect?"

And thus I say to you, who are gathered here, those of you
301 who believe in humanity, who believe in brotherhood, who believe in the beautiful and good things of life rather than in bloodshed and murder, that we must use our strength and our power to wipe out of existence, to put out of office, this government, which, contrary to the wishes of the people of this country, has put this law on the statute books. And I say to you further—I say to you here, now, believing as I do, that war is a horrible thing, believing with all my heart and soul that to go forth in war is to murder your fellow human beings, believing, as I do, that this war is a war in the interests of the ruling class only, believing, as I do, that this war has come into existence because the class in power and in control of the government of this country desires to continue to make profits out of the murder of human beings, and to protect those profits which they have invested in loans to one side in this war—I say to you, as I have said before from the rostrum on this Public Square, that I refuse to become the victim of the ruling class. I said to you before I knew that the ages specified in this law would not include me—I said to you then that I would refuse to be conscripted, that I would refuse to shoot my fellow human beings, and I say to you now that there is no power on the face of the earth that could make
me shoulder a gun and go forth in the world to murder an-
302 other fellow human being of mine. There is no power in the government of this country that can say to me, with the conscientious objections which I have to this war and to the work of the

war, that I shall murder another human being, and, rather than commit that act of murder, than to be forced into that act of murder, I will permit the government to riddle me with its bullets and die in this position than to murder another human being.

My friends and comrades, when I speak to you thus, I am speaking to you in all seriousness. I am speaking to you with that spirit which has been shown by those ten thousand men in England who are today lying in English jails because they refused to go to war, because they refused to permit a government to conscript them. I am speaking to you as Karl Leibknecht spoke in the German nation, as he spoke in the Parliament of that country, when he denounced the war as a war of the ruling class and stated his unalterable opposition to that war. And I say to you that, if you are inspired with this ideal, which is the hope of the future, if you are inspired with this desire to build a better world, then you must stand with the Socialists. You must fight with the Socialists against war. You must use all of your strength and power to bring the day when
we can wipe this law—which thus violates the dearest right
303 of personal liberty, which would cause a man to kill another
human being—until the day comes that we can wipe this law off of the statute books by a people rising in their might, taking control of their own affairs and putting out of office a government which has betrayed them into this thing.

My friends, they have said of us Socialists who stand here before you that we are traitors, that we are street-corner traitors. I say to you that it is not the men and women who have dedicated their lives to upholding this principle of humanity, not the men and women who desired nothing but to bring brotherhood and comradeship and fraternity into the world, not the men and women who opposed this war before the election time and who oppose it now, who are traitors to the American people—but I say to you that it is the men who asked for their election, the men who pleaded through you to support them, because they kept you out of war, and then hurled you into the war, who are the traitors, if there are any traitors to the American people in this country at the present time.

We must organize our forces to meet the situation. We must organize our power to alter this situation. There is no hope for the people, of again bringing peace and humanity and the spirit
of brotherhood and the spirit of comradeship and the good
304 and beautiful things into the world and ending all of this
horror and misery and suffering and bloodshed, unless the people themselves organize their power and make themselves articulate. We can, by meetings of this character, by coming together here, five thousand people this afternoon, and protesting against this conscription law—we can tell the government of this country that we do not want this law and we demand that Congress repeal this law, and if this Congress of this country will not repeal this law—because we meet in mass meetings all over this country—for just as we are meeting here today, men and women are meeting in other cities, and just as we are protesting against war, so men

and women are protesting the world over—if we cannot make this government understand that the people did not want war, that they did not want conscription, then we must await the day until we can go to the election booths again and sweep that government out of power and elect men to power who will represent the wishes of the people and change this law and repeal this law, this traitorous act of the ruling class of this country, which has taken from the people of this nation the dearest rights of personal liberty, even to the extent of making them do murder.

And we of the Socialist Party are carrying on this fight.
305 We are here to carry on this fight. We are here to organize the people of this country for this struggle. We are working toward this end, that out of the chaos, out of the bloodshed, out of the horror of this war at the present time there may come a new society, a new world, a new organization of the people, which will end the cause of war by ending the private ownership of the industry which brings war into existence, which, in place of appealing to us in the shape of patriotism to do murder, will appeal to us to be friendly and comradely and brotherly toward all other nations. For, my friends, there is no hatred in the hearts of the people of this country against the people of Germany. There is no hatred in the hearts of the English workers against the people of Germany, there is no hatred in the hearts of the French people against the people of Austria, or of the Russians against the People of Turkey. They are not trying to kill each other, they are not trying to murder each other, because they hate each other. It is a delusion which the lying prostituted press of this country has tried to put into our minds in order to trick and deceive us. The people of those countries would, if they were allowed to do their will, reach out to each other the hand of brotherhood and
306 fraternity. It is only because the commercial interests of the ruling class are at stake that they are thrown at each other's throats to murder each other.

We are here to fight to the end, to end this condition in the world, to build up this new society, to build up a new spirit in the world, to end war, to end murder, to end suffering, to end the destruction of millions of lives and billions of wealth and bring into existence this comradeship of the future, this brotherhood which must inspire the hearts and minds of all men, in which we will have fraternity and equality, and in which for the first time there will be reserved to the people those inalienable rights of life, liberty and happiness which the Declaration of Independence says is the fundamental right of every human being. We ask you to stand with us. We ask you to work with us to achieve this beautiful goal of Socialism, the brotherhood of man, for today, as never before, rings out in the world the cry of the poet of the social revolution:

"Come, shoulder to shoulder
E'er the world grows older.
The cause spreads over land and sea.
Now the earth shaketh and fear awaketh.
And joy at last for thee and me."

"Joy at last for me and thee"—for the working class, and for the first time there will come into the world this new spirit
307 of love, of equality, fraternity, happiness and peace.

The Court: That is as you remember it?

The Witness: That is as I remember the speech I made at that particular time.

Q. I will ask you if, during this meeting, there was any reference made by you to registering?

A. As I stated in this resume, I referred to it only that, "Soon the youths of this nation would be asked to register for conscription."

Q. State whether or not you gave any advice to any one on the subject of registering?

A. I did not.

Mr. Wertz: I object.

The Court: The objection will be sustained to that question in that form.

Q. State whether or not at this meeting and during this speech that you were making, or possibly any subsequent statements at that meeting——

The Court: No, at that meeting and in the course of that speech is the limit of the inquiry against him, I think.

Mr. Sharts: I think if Your Honor will remember the notes that were offered here of the stenographer, there was a reference to handing out cards, was there not?

The Court: That was in the course of his speech, I believe, that he was handing out pledge cards, and there was something said about that.

Q. Have you made any reference in this speech that you
308 have here delivered to that subject?

A. I have not.

Q. I wish you would state what remark, if any, you made at that time?

A. At the time I was asking for support for the Socialist Party I handed out a card applications for membership in the Socialist Party.

Q. Have you any of those cards with you?

A. I have not.

Q. Do they contain on them any reference to registration?

A. They do not.

Q. Upon the close of your remarks, what next occurred?

A. I left the rostrum and proceeded to walk toward the police station for the purpose of visiting and finding out what the charge was against Mr. Wagenknecht.

Q. Had you at any time during your meeting observed the young man who was indicted with you on the charge of failing to register?

A. I have never seen him in all my life until today.

309 There was a conference of speakers held prior to both the meetings on the 20th and the 27th. Mr. Wagenknecht and myself were present at the conference on the 20th and at the conference on the 27th. Mr. Baker came to the City of Cleveland a number of days prior to the meeting of May 20th. I do not recall the exact date. I do not recall whether or not Mr. Baker was in the city of Cleveland at the meeting on May 13th. I do not recall any conference or meeting with Mr. Baker at which this resolution which was introduced here was discussed. There was no reference made at any of the meetings that Mr. Baker held and at which I was present as to any such resolution.

I attended the convention which drafted the proclamation and war program of the Socialist Party which has been introduced in evidence as "Defendants' Exhibit No. 1" and was a member of the committee which wrote it. I personally wrote clause 2 of the program, dealing with the question of conscription.

Q. Did the committee of which you were a member at the convention at any time consider the matter of registration?

A. I did not.

Mr. Wertz: I object.

The Court: The objection will be sustained to that.

Mr. Sharts: If your Honor please, I think you have already ruled with regard to intent, that it is proper for us to introduce circumstances that would tend to show what the intent of the speaker was in any remarks.

310 The Court: I have ruled that he may say what his intent and motive was, but what you are inquiring about is entirely too remote and irrelevant to that inquiry, as I view it.

Mr. Sharts: If Your Honor please, here is the position I would like to make clear that I am taking in this matter. The intent with which he uses the word "registration" in his speech is more or less connected with his position as a speaker for the Socialist Party and as a national committeeman of the Socialist Party, and in connection with the program and proclamation of the Socialist Party of which he was a part author.

The Court: I think it is entirely too remote here for you to undertake to prove the discussion of the platform committee of a convention held at some other time and some place else.

Mr. Sharts: Enter our exceptions.

Cross-examination.

By Mr. Wertz:

I understand that the state office of the Socialist Party of Ohio is located at 1291 Cook Avenue, Lakewood, Ohio.

I was not the presiding officer of the meeting on the 13th of May. I do not recollect who was the presiding officer. I was not on the platform. As to whether I handed this resolution (referring to Government's Exhibit No. 1) or a copy of this resolution to the young newspaper man, I do not remember of handing any-

311 thing to any newspaper man at that meeting. If I had handed it to him, I would remember of doing so. I have no recollection of handing it to him. I spoke for twenty minutes against the adoption of a resolution to instruct members of the party not to register. I was present at the meeting when this resolution was adopted. I do not know of any authorization that was needed to give Mr. Wagenknecht the power to send out such literature. The State Secretary has certain powers in connection with the propaganda, which he can carry as he deems well and fit. The meeting on the 13th of May was called for the purpose of nominating candidates for political office. It was an illegal meeting insofar as it took any action in regards to conscription. So far as that particular leaflet is concerned (referring to Government's Exhibit No. 2) I did not see it until today in the court room. I did not say that the only part of that circular which I ever heard of before was the part containing the resolution which was adopted on the 13th of May. I have seen the Constitution of the United States before. I have seen the speech of Daniel Webster before. It was published in one of our socialist newspapers and I read it there, so I have seen other parts of that circular. I did not see all of that circular as it stands until today.

Q. Did you ever see this circular here marked "Government's Exhibit No. 3?"

A. Yes, I have; I believe so. If you will let me examine it, I will make sure.

312 Mr. Sharts: When was that introduced?
Mr. Wertz: It was not introduced. It was identified.

Q. When did you see that before?

Mr. Sharts: I object, if Your Honor please, on the several grounds. First of all, there has been no identification of that leaflet with the activities of these men. There has been no identification of that leaflet in connection with Mr. Schue.

The Court: I think he may be asked when he saw it before. The objection is overruled.

Mr. Sharts: Enter an exception for the defendants.

I saw that circular pinned to the wall in the hall of the building where the socialist headquarters are located and took it down and put it in the wastebasket. On Sunday, May 13th, at the time of the meeting that I have been inquired of. The socialists, those in the socialist movement, had not been seriously discussing the position of refusing to register at that time. It was first brought up at the meeting. I knew at the time that this resolution was under discussion over at the socialist hall that it provided: "That we recommend to and urge all members of the party and workers generally that they refuse to register for conscription." In answer to the question as to whether I knew this part was in there: "And we pledge to them our financial and moral support in their refusal to become the victims of the ruling class," I heard it read. I do not know of

any specific reason for pledging to these men who refused to register financial support. I know a socialist called Clare. He is a
313 member of our organization. He is the custodian and literature agent at socialist headquarters. He is there at times and out at meetings more often. I certainly did not issue any instructions to Clare in regard to furnishing financial assistance to men arrested, who refused to register. I did not instruct him to furnish any other kind of assistance.

314 Q. Did you say in that speech on the Public Square: "We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the Billy Sunday form of revivalism to induce you to register for conscription. They are afraid." Do you recall having said that, in substance?

A. I recall having said that in relation to the attempt to raise an army by the voluntary method and the failure of it, and then went on, as I stated in my speech, to show that the government had found it impossible, because the people were opposed to war, to raise such an army and thus were trying to compel the people to fight.

The Court: Put your question over again and ask him whether he said that.

(To the witness:) You will then give a direct answer of "Yes" or "No."

(Question repeated.)

A. I recall having said that in relation to recruiting and not——

Q. No. Did you say that in substance?

A. I did not say it in relation to registration.

Q. I did not ask you that. I asked you if you said that in substance in your speech.

A. No.

Q. Then the stenographer hasn't it correctly reported in
315 this transcript?

A. I saw the stenographer numerous times asking for information.

Q. I did not ask that, I asked you whether or not the stenographer had a correct report of what you said.

A. If he has put those words in my mouth, the report is not correct.

Q. Is this correct?—did you say this: "They"—speaking of the government—"are afraid that the working class of this community on registration day enact their own referendum in regard to this law by refusing to register. (Loud applause)"?

A. I did not. I referred to a referendum in connection with the failure of the government to permit the people to vote on the conscription law.

Q. The stenographer then has got you correctly reported on that subject?

A. Evidently not.

Q. Did the stenographer report you correctly on this: "What is to be the position of the working class of this nation in regard to war and registration for conscription? Are we in this country, having been bludgeoned—no other word describes it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the President and Congress was elected—are we to meekly submit and lie down and permit the ruling class to do its evil, base, dirty work?"?

A. I did not make that statement as appears there.

Q. Did you make that statement in substance?

315 A. You are asking me to say that the stenographer has got it correct now.

Q. Did you make it in substance?

A. I did not use the word "registration" in that statement, nor the word "dirty," which I never would use in that connection.

Q. It is correct except that you did not use the word "registration"?

A. I did not say anything about registration.

Q. Did you make this statement in your speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription?"

A. I very likely did, referring to the National organization's position.

Q. "We have taken the position, this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country to enact any laws which are intended to force submission of the people to voluntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, when the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law." Did you make that statement in your speech in substance?

A. The statement as it appears without the statement which followed would do me an injustice.

317 The Court: The question is did you make that statement.

The Witness: I qualified the statement by stating the way the people should act with reference to that law.

Q. Did you make that statement?

A. With a qualification.

Q. Then the stenographer has you correctly reported: "The only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law."—That much of it is correct?

A. I went on to say that the way to refuse to submit is to organize the strength of the people to wipe the law from the statute book, as I stated in my speech.

Q. Is this the qualification which you made to that statement: "And so the Socialist Party *by* the city of Cleveland by resolution has gone on record as urging and recommending to every worker

who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the Socialist Party that we urge and recommend that they refuse to be registered for conscription?"

A. I did not say that in reference to registration. I said it
318 in reference to conscription.

Q. "To refuse to be registered for conscription."?

A. To refuse to be conscripted.

Q. Explain to the court and jury how you can conscript these men for the army until they are registered?

A. I will gladly explain, for the purpose of the court and jury, that I further stated, that rather than be conscripted, rather than be compelled to fight in this war, I would be stood against a wall and riddled with bullets. I might register and still not submit when I was conscripted. That was my position.

Q. Will you explain to the jury how in your mind it was possible to conscript the socialists or the young men of this country without first registering them under this law?

Mr. Sharts: I object.

The Court: I think that is a *l*egitimate —.

Mr. Sharts: If Your Honor please, the point is this; He is asking him to explain how they could conscript them without registering. He has not urged their conscription.

The Court: I will overrule your objection, and on this ground: The witness has undertaken, every time that the word "registration" has appeared in any of the transcript of what he said upon that occasion, to say that he did not use the word "registration," but it was "conscription," undertaking to draw in his mind some distinction between opposing registration for conscription and opposing conscription. Now, as bearing upon his intent, and what he
319 meant by his acts and words, I consider the District Attorney's question competent.

Mr. Sharts: Enter the exception of the defendants.

A. I would gladly state, in reply to the question, that this difference existed in my mind: A man might submit to registration, he might voluntarily go and register his name as a man between the ages, go through that formality, and later, if he happened to be one of the victims who was selected to go and shoot his fellow human beings, he might well, as tens of thousands of men in England have done, refuse to be conscripted and to murder his fellow human beings. That is my position.

Q. I did not ask you for your position. I ask you how they could conscript these men without registration? By what process in your mind would it be possible to do that?

A. I think it would be entirely possible. I do not believe it is

my business here today to tell the government how it might have done this thing differently.

Q. How did you understand that these men could be conscripted without being registered first?

A. You will remember that I did not say to them that they should refuse to register but said that they should refuse to be conscripted, which carried with it the fact that they might well submit to registration, but later they might claim exemption, they might raise all of the objection, and if they were still selected to fight in the army and they had these conscientious objections, which I stated I had, they could then refuse to do this work for the government.

320 Q. That is all you ever had in mind?

A. That is my position.

The Court: And did not your statement also carry with it that they might refuse to register?

The Witness: Not necessarily.

Mr. Sharts: I object. I wish to enter the exception of the defendants to the inquiry by the court.

Q. Did you follow that statement that I asked you about last with: "I say to you here this afternoon, as I said at the first meeting which I addressed on the Public Square after war was declared—at the first meeting, at a time when the ages in the conscription law had not been fixed—I said to you then, when I personally was in danger *of* conscription, that if I came between the ages provided for in that law that I would refuse to register for conscription." Did you say that?

A. I stated in my speech what I did say, which was that I would refuse to be conscripted.

Q. Did you say that?

A. I did not say that.

Q. Did you continue immediately after that: "My friends, I am ready to say more: That if this law is amended, if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the Million against the socialists on the battle *b*ields of Europe, if, after the first million or two of the flower of the humanity of this country has become

321 the victims of the ruling class in their insensate greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends this law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted"?

A. I certainly did not state what appears there.

Q. The stenographer manufactured that out of his own mind?

A. I can show you one positive statement that he did manufacture in that sentence.

Q. Is the substance of that correct?

A. It is not.

Q. Did you continue with this statement: "Further, that if the time comes that I am asked to go into the army, if my name were registered by force and the government drafted me, believing, as I

do, in humanity and being opposed to killing my fellow human beings—opposed to the wholesale murder which is going on in Europe, then I say that the ruling class and government of this nation will find that they will have to stand me against a stone wall before they can bring me into the army to fight their battles"?

A. I did not make the statement as appears there. I made it as I stated it in my speech, which is quite different.

Q. Do you recall using the words: "If my name were registered by force"?

A. I certainly did not use that expression.

322 Q. Is what you have testified here, in answer to a question by Mr. Sharts, in which you reproduced your speech—is that all you said over there at the Public Square on that subject?

A. It is what I recollect saying on the Public Square, and it is very vivid in my mind.

Q. Now, continuing after what I read to you before, do you remember that you made this statement: "I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made." Do you recall that?

A. I surely did, our position in regard to the war and in regard to conscription.

Q. And did you continue: "I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder"?

A. That grows out of my statement that I would refuse to be conscripted.

Q. "I would be saying little to you if I left you with only this message, if I only told you that we socialists did not intend to register for conscription." Did you say that?

A. I did not.

Q. And did you continue: "If I only told you that we socialists did not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete"?

A. I did not say what you have just quoted.

Q. Then the stenographer who took that down made a mistake in what you said?

A. I am quite aware that he made many errors in taking it down, from the way he took it.

323 Mr. Sharts: Was this circular offered in evidence? (Referring to exhibit marked "Government's Exhibit No. 3.")

The Court: No. It has not been offered and has not been identified in any such way as, in the opinion of the court, would make it competent if it were offered.

Redirect examination.

By Mr. Sharts:

Q. The circular that Mr. Wertz showed you you stated you saw pinned on the wall of the socialist headquarters and you took it down and put it in the wastebasket?

A. I did.
Q. What was your purpose in doing that?
A. I was not in sympathy with what appeared on that circular.

Mr. Sharts: Now, if Your Honor please, I would like to have that introduced.
The Court: Do you object to its being introduced?
Mr. Wertz: No.
The Court: It may be introduced.

(The said exhibit, marked "Government's Exhibit No. 3" was also marked "Defendant's Exhibit No. 2" and is hereto attached and made part hereof.)
(The said exhibit was thereupon read in evidence to the jury by counsel for the defendant-.)

Q. This is the circular that you are not in sympathy with?
A. I took it down and put it in the wastebasket.
Q. State why you are not in sympathy with the statement in that circular?
A. Because it urges young men not to register.

324 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf W. J. BAUKNET who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is W. J. Bauknet. I am in the banking business. I am assistant treasurer of the Pearl Street Savings & Trust Company, of Cleveland, Ohio. I am acquainted with Mr. Wagenknecht, one of the defendants in this case. I have known him from three to four years. My acquaintance has been through advertising, probably two or three times a week. I have met him frequently during those three or four years.
Q. I wish you would state to the jury your opinion as to Mr. Wagenknecht's character?
A. Mr. Wagenknecht's character is good. I don't know of any bad habits he has. He has never expressed himself in any other way only through business, and I have had business dealings through advertising business—a little association that he was secretary of—for the last three years.

Cross-examination.

By Mr. Wertz:

My association with Mr. Wagenknecht has come in a business way, through advertising. He was secretary of a small paper that was published in our location, the south end. I gave him advertising for the paper he represented. It was not his paper. The paper is called the "Bulletin," an advertising medium. It is not a socialist paper. The

purpose of the advertising is general business advertising of
325 the merchants along West 25th Street. He used to call for the copy for the ad I gave him for that paper. He would call about once a week on copy, and talk over advertising from time to time on things that we used to have, like picnics and carnivals along the street. That was the only way I knew him. These transactions took place about once a week. From those meetings I formed my judgment as to his character. I have met him outside of meeting there.

326 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf HARRY DECKER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Harry Decker. I am now in the manufacturing line. I am now and have been a resident of Cleveland for 53 years. I am acquainted with Mr. Wagenknecht, one of the defendants. I have known him, I should judge, about four years. He was during that time in my employ and I saw him practically every day. I have formed an opinion regarding his character.

Q. Now, state to the jury what that opinion is as to his character?

A. I would not know anything, gentlemen, to reflect on his character. I must say that I never had a man in my employ who was more loyal and more agreeable and seemed to be more conscientious than he was. He took care of his work, performed his duties that were assigned to him, till the time that I quit business. Had I remained in business, he would still have been with me, I suppose.

Cross-examination.

By Mr. Wertz:

I was in the dry-goods business on the West Side.

327 Thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf MAYO FESLER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Mayo Fesler. I am secretary of the Civic League. I am acquainted with Mr. Ruthenberg. I think the first time I met Mr. Ruthenberg was about 1912, during the arrangements for the Constitutional Convention of Ohio. Mr. Ruthenberg at that time was a candidate for the Convention on the Socialist ticket. Since that time I have not met him frequently. I have met him at numerous times, that is, in times of political campaigns. I have not *have* a very broad opportunity of forming an opinion. My organization

passes judgment upon candidates for public office. And this particular time that I have mentioned, the socialists had candidates for the Constitutional Convention. We did not pass judgment upon the candidates at that time. We simply made a statement as to their training, and so on, which the candidates themselves gave us. After that date, whenever Mr. Ruthenberg was a candidate—I think he was two or three times after that—the socialist party as a party declined to furnish my organization with any information, so that, all that we did in connection with those candidates was to make a statement of their age, training, occupation, and so on, with no opinion on their qualifications for a particular office, or no opinion as to their character. Now then, my knowledge of Mr. Ruthenberg, my acquaintance with him, has been only as I have
328 come in contact with him at those times, and then for two years, when I was secretary of the City Club, when he was on the platform before the City Club, I think on two or three occasions to address us from the socialist point of view.

Q. Have you formed an opinion of his character from those opportunities to converse with him and meet him?

A. Yes, I think I have.

Q. I wish you would state to the jury what your opinion is as to his character.

A. I should like to preface it with this statement: that my acquaintance with him would not warrant me in passing judgment on him or in taking up with my executive board an expression of judgment as to his qualifications for office, but my acquaintance with him has led me to feel that Mr. Ruthenberg is an honest, sincere gentleman, but misguided in his political and social beliefs.

329 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf A. De Beauclaire, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is A. De Beauclaire. I am manager for a New York Publishing house. My office address is 416 American Trust Building. My residence is 7217 Melrose Avenue, Cleveland. I have lived in the city of Cleveland 25 years. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have known Mr. Ruthenberg constantly 18 or 20 years as an employe. During the time he was in my employ I saw him every day. I feel that I had ample opportunity to form a correct opinion of his character.

Q. I wish you would state to the jury what, in your opinion, his character is?

A. Absolutely truthful and reliable gentleman.

Cross-examination.

By Mr. Wertz:

Mr. Ruthenberg was in my employ from 1897 to 1907. He has not been in my employ since 1907.

Redirect examination.

By Mr. Sharts:

Since he left my employ I have had opportunities to meet him occasionally.

Q. What opportunities for forming an opinion as to his character since then have you had in the way of meeting with him?

A. None particularly since he left my employ. I have
330 only met him occasionally, as we meet people we know on the streets, and chatted with him, and he has not been in my employ, but, so far as my knowledge of him goes, I have learned nothing to the contrary of my previous knowledge of him.

331 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf WILLIAM B. FISH, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is William B. Fish. My occupation is manufacturer of cloaks, in connection with the Printz-Biederman Company of Cleveland. I have resided continuously in Cleveland for about 25 years. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have known him as an employe of ours approximately three years. While he was with us my opportunities for contact with him were frequent, daily. During that time I have had an opportunity to form an opinion as to his character. I should consider that he had a reputable character. He is what I would call a good man.

Cross-examination.

By Mr. Wertz:

We let Mr. Ruthenberg go about a month or more ago, possibly six or eight weeks ago. The reason we let him go is because we felt that the views he held upon matters pertaining to subjects that are particularly subject to test during the war crisis were not such that we could afford to harbor him under our roof. The views that I had in mind when I said that we could not harbor him under our roof were views that called in question the authority of this Government to do the things that it is trying to do now. I cannot say that he had pronounced views upon that subject except in a general way. I understood those to be his views.

(Thereupon the defendants rested.)

332 Thereupon the Government, further to maintain the issues on its part, called as a witness in its behalf, in rebuttal GEORGE WILKINSON, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is George Wilkinson. I am postmaster in East Palestine, Ohio. The package marked "Government's Exhibit No. 27" arrived at East Palestine, I think, on the 22nd of May, in the morning.

Cross-examination.

By Mr. Sharts:

The pencil writing on Government's Exhibit No. 27 is not my writing. One of the clerks in the postoffice at East Palestine, Ohio wrote that . (Referring to pencil writing reading: "Received torn at East Palestine postoffice.") The paper was torn a little bit when that arrived. I think I saw this bundle (Referring to Government's Exhibit No. 27). It was a bundle like that which arrived at East Palestine postoffice and was sent from there to the District Attorney at Columbus, Ohio. I don't know who sent that package, but, if it is the package they have reference to, it was sent from Cleveland, Ohio. I did not see him send it.

Mr. Wertz: If we have not already done so, I want to introduce in evidence all of these Government exhibits Nos. 1, 2, 3, 4 and No. 27.

Mr. Sharts: What is No. 27?

Mr. Wertz: The package circulars.

Mr. Sharts: I want to enter an objection to the introduc-
333 tion of the package, Government's Exhibit No. 27. I think it is entirely irrelevant in this case.

The Court: The question of the competency of Government's Exhibit No. 27 depends upon the identification of that as something circulated by Mr. Wagenknecht.

Mr. Wertz: Mr. Wagenknecht, himself, as I recall it, said that he sent out hundreds of packages just like this one and sent some to this particular man Hennacy, too.

The Court: It will be admitted.

Mr. Sharts: Enter the exception of the defendants.

The Court: This completes the testimony in this case.

Thereupon both parties rested.

The above and foregoing, together with the exhibits hereto attached and made a part hereof, being Government's Exhibits 1, 2, 3, and 4, and Defendants' Exhibits Nos. 1 and 2 is all the evidence offered and received on the trial of the above entitled case.

Adjournment to July 21, 1917; 9:00 a. m.

334 July 21, 1917—9:00 a. m.

The Court: Gentlemen of the Jury, on yesterday afternoon I permitted two items of evidence to be introduced to you without at

the time instructing you as to the extent to which it is to be received and considered by you, which I deem it my duty to charge you with respect to. One is what is known as the Government's Exhibit No. 4, a copy of a letter dated May 25, 1917, purporting to have been written by the defendant Wagenknecht and the other is Government's Exhibit No. 27, a package purporting to have been sent through the mails. I am instructing you that those two items of evidence are to be received and weighed by you only as against the defendant Wagenknecht, and not as against the other two defendants here, and are to be received and weighed against him only for the purpose of enabling you to pass upon the intent with which his acts were done and speeches made on the 27th day of May, 1917.

Mr. Wertz: If the Court please, would not the jury also be entitled to consider this evidence by showing the probabilities if they found that these had been mailed after the 15th of May, or the letter written after the 18th of May, 1917——

The Court: I will not say anything further than I have said on that subject.

Mr. Sharts: If the Court please, there are four brief charges
335 that we request the Court to give to the jury before argument.

The Court: I will receive your request, and, to the extent that I think they are sound law, I will give them in my general charge to the jury, but I will not give any of them before argument. That is not the practice of this Court.

(Exception by defendants.)

The said requests to charge are as follows:

If you find that defendant Wagenknecht aided and abetted, induced, counseled and commanded Alphons J. Schue not to register, but that defendants Ruthenberg and Baker did not in any way assist the said Schue not to register, then you may return a verdict of "Guilty" against Wagenknecht and a verdict of "Not Guilty" against Ruthenberg and Baker.

If you find that Wagenknecht and Baker aided and abetted Schue not to register but that Ruthenberg did not in any way aid and abet the said Schue not to register, you will return a verdict of "Guilty" against Wagenknecht and Baker, and a verdict of "Not Guilty" against Ruthenberg.

Gentlemen of the Jury, I charge you that you shall take the testimony of Alphons J. Schue with the greatest caution, and I charge you that it is extremely dangerous to convict any man on the uncorroborated testimony of an accomplice.

336 You must be satisfied beyond a reasonable doubt that all the three defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker did so aid, abet, counsel, command, induce and procure the said Alphons J. Schue not to register before you can return a verdict of "Guilty" against any one of them or all of them and if you feel that you cannot satisfy yourselves beyond such reasonable doubt, you will return a verdict of "Not Guilty."

You will disregard any testimony that has been given here as

tending to prove that these defendants aided Schue not to registe except that testimony which tends clearly to show that this aidin aletting, counseling, commanding, procuring and inducing was don or said in the presence and hearing of the said Alphons J. Schu and did so, in fact, induce him directly not to register, and unle you find these to be the facts, you will return a verdict of "N Guilty."

Thereupon, after argument to the jury by counsel for the respectiv parties, the Court charged the jury as follows:

337 The Court: It is my intention, Mr. Sharts, to give the d fendants the benefit of all the special requests that you hav presented.

Gentlemen of the jury, in the important public duty which you ar called upon, in connection with myself, to perform, there is, I ma say, a division of labor. It is my duty only to advise you correctl as I hope to do, about the law which applies in this case. It i your duty, accepting that law, to apply it to the facts. It is als your duty to determine from the evidence introduced before you wha the facts in this case are, and whether or not, upon those facts, unde the law, the defendants, all of them, one of them, or two of them are guilty or not, as charged in the indictment. I have no purpos therefore, to intimate to you in the course of my charge my in dividual opinion as to what the facts are nor as to the guilt or inno cence of any one or all of these defendants, and, if any of yo should draw an inference from anything that I have said or may sa as to what my personal opinion is in that respect, I ask you to dis regard it.

The three defendants here are on trial for having aided, aletted counseled, induced and procured one Alphons J. Schue to violate law of the United States. That is the charge against the thre defendants, and, as I have said—the evidence justifying it—you ma find any one or more or all of them guilty, and any one or more o all of them not guilty.

338 The law of the United States which they are alleged t have caused or procured Schue to violate is an Act passed th 18th of May, 1917, entitled: "An Act to Increase Temporarily th Military Establishment of the United States." It has been known and referred to among some persons as the Selective Service Law, among others as the Draft Law; it has been referred to by still others as th Conscription Law.

Gentlemen of the jury, I say to you that that law is a law of thes United States, that it is a valid, constitutional law, and that it is bind ing upon all of the citizens of the United States and all other persons within, and under the jurisdiction of the laws of, the United States. You will, therefore, disregard any suggestion or intimation that has been made to you, either in the testimony or in argument, or else where, of any question about the constitutionality or the validity of that law or about its binding force and the duty resting upon each and every person within the jurisdiction of the United States to obey it.

That law, among other things, provides, that it shall be the duty of all male persons, between the ages of twenty-one and thirty, both inclusive, to register themselves in accordance with the proclamation of the President of the United States. The Proclamation was issued fixing the 5th of June as the time, and the voting booths of each precinct as the place, for all persons subject to its provisions to comply therewith. It thereupon became and was the duty of Alphons J. Schue to register, and his failure to register in accordance
339 with its provisions, he being a male citizen within the prescribed ages, constitutes an offense, a violation of that law.

Now, the charge against the defendants here, as I have stated, is that they aided, abetted, counseled, commanded and induced him to violate that law, and that they have thereby made themselves, if you find from the evidence beyond a reasonable doubt that they did so, guilty as principals in the same degree of the same offense that Mr. Schue was guilty of.

The elements, therefore, of the crime which is charged against these defendants, and which it will be necessary for you to find from the evidence that they are guilty of beyond a reasonable doubt, are:

First. The failure of Alphons J. Schue to register in accordance with the provisions of that law, and the further fact that he was a person subject to the provisions of that law and required to register.

Second. Did the defendants here, any one or more of them or all of them, aid, abet, counsel, command and induce him so to unlawfully and wilfully refuse to register, and thereby cause and procure him to commit that crime?

Third. Did Mr. Schue wilfully fail and refuse to register as a result and consequence of the counsel, commands, influence, or advice received by him from these defendants or either of them?

These are the elements of the crime and the fundamental
340 facts you must find from this evidence beyond a reasonable doubt are present here in this case before the defendants or any one of them can be found guilty.

Now, gentlemen of the jury, it is necessary that you find from the evidence beyond a reasonable doubt all of these things, but I am going to charge you more particularly as to the last two elements of the crime. It is necessary, as I say, that you should find beyond a reasonable doubt that these defendants, some one or more of them, or all that you shall find guilty, if you find anybody guilty, did wilfully advise, aid, counsel, abet or induce Schue to commit that crime. It is not necessary that this aiding, this abetting, this counseling, this inducing, should have been in any particular manner. It is not necessary that you should find that these defendants or any of them knew that he was present there listening to what is alleged here against them. It is, however, necessary that you should find beyond a reasonable doubt that what was said by these defendants and each of them was said with the intent, wilfully and knowingly, to cause persons within the hearing of their voices to wilfully fail to register and comply with the provisions of this law.

In that connection, and as bearing upon that part of it, I wish to announce some other principles of law to you. It is said that every

person under the jurisdiction of the laws of the United States is
titled to freedom of opinion, and that is true, and, being entitled
freedom — opinion, he is entitled to freedom in expressing
341 opinions, and that is true. It is his privilege, and it is pro
for every person within the jurisdiction of our laws, wit
certain limits, to oppose the adoption of laws. It is the privilege a
right of everyone to urge the repeal of laws. It is the privilege a
right of every one to express his opinion with respect to the wisd
or unwisdom of laws that have been passed, and to criticise and c
ment upon the conduct of public officials. All of that is true.

There is, however, this limit in the law upon those rights a
privileges. No one has the right, under the guise or pretext of e
cising the existence of a law or the wisdom of a law, or of advocat
or urging its repeal, to urge, induce, or incite anybody to violat
valid existing law of the United States. Whenever he transgres
that limit and his words and acts, however they may be gui
or phrased, are intended by him for the purpose, and will have
necessary and direct result, of causing or inducing somebody to
late such a law, then he is guilty also with the person who has ac
upon the aiding, abetting, advice and counsel that have been so giv
to him. It is not permitted to anyone under the guise of freed
of political opinion or freedom of speech, or freedom in the enj
ment of his religious convictions, to violate, or intentionally ca
others to violate, the laws of the land.

342 A Mormon cannot, under the guise of its being his religi
live in polygamy within the limits of the United States. C
who does not believe in the institution of the Sabbath, or Sunday,
do a majority of the people in the United States believe in it, a
religiously disbelieves in it, is not thereby exempted from obedie
to the Sunday observance laws, and is not exempted from resp
sibility if he incites, advises, causes, or procures others to viol
them.

So, in this case, gentlemen of the jury, the right and freedom
opinion on the part of these defendants, any of them or all of them
their political or other beliefs as to the validity of this law or its c
stitutionality, or as to its wisdom or unwisdom, their right to u
its repeal and to express their opinion with respect to it—does
protect them, under the law, if you should find from the evide
beyond a reasonable doubt what they, all of them or any of the
wilfully and intentionally urged, counseled, advised or procu
Schue to violate that law.

Now, gentlemen of the jury, as I have said, it is not necessary t
that aiding, abetting, commanding, counseling and inducing shou
be given in any particular way. It is only necessary that you sho
find from the evidence beyond a reasonable doubt that such was
wilful intent of these defendants or either of them, if the evide
here shows that they were guilty of the conduct alleged against th
You must, of course, find that.

343 While you must find the three elements of this crime
yond reasonable doubt, it is not necessary that you sho
find that they used the words when they gave the advice, that "y

shall not" or "you must not" or "you ought not" to register. It is sufficient if you find that it was their wilful intent to produce that result in the minds of their hearers; and that the language used by them, as a whole, was calculated to produce and to cause necessarily that result in the mind of anyone that listened to it who was within the age limit, and, therefore, called upon to observe the law.

Now, I have said in this connection, gentlemen of the jury, that I am intending only to state to you the law. That is my part of this trial, and your part is to find the facts. I have said, however, that you must find each and all of these elements of the crime, including the further element that Schue was thereby caused and induced to commit the violation of law, beyond a reasonable doubt and that is the law. The humanity of our law is such that every person put upon trial charged with the commission of a crime is presumed to be innocent until he is proven guilty by the evidence produced before you beyond a reasonable doubt. I do not know that I can make clearer to you what is meant by the expression "reasonable doubt." Learned judges have said that efforts to make the expression clearer than the words "reasonable doubt" make it are likely to be
344 misleading and confusing. I shall, therefore, not charge you further on that, than to repeat that the evidence must show each and all of the defendants guilty beyond a reasonable doubt of the crime alleged against them, and must show that as to all of the elements of the crime, before you can render a verdict against them.

As part of your duty it will be necessary for you to consider the credibility of the witnesses who have testified here before you. You are to weigh the testimony and to judge of the credibility of the witnesses. It is for you to determine, and not for me to determine, the weight and credibility of the witnesses. It has been said, and I say to you, that in passing upon the credibility of witnesses you are entitled to take into consideration their manner of testifying, their interest in this cause or the result of this cause, their apparent bias and prejudice, if any, or their freedom from bias and prejudice, if any, the inherent probability or improbability of the statements made by the different witnesses, and from all of these and such other considerations and facts as are present in the case, applying thereto your fund of common sense and human experience, say from this testimony what the truth is.

In that connection, however, I deem it incumbent upon me to say this further to you. Alphons Schue is indicted as an accomplice, as a particeps criminis or a party to the crime alleged here against the defendants, and it is a rule of law for the weighing of the testimony of accomplices that it is to be looked upon with great
345 suspicion, and that ordinarily it is the duty of the Court—and I am now performing that duty—to advise you that it is unsafe to convict upon the uncorroborated testimony of an accomplice. It is also the law, gentlemen of the jury, that it is within your province to render a verdict of guilty upon the uncorroborated testimony of the accomplice, if you find therefrom that the defendant is guilty beyond a reasonable doubt. I say this also to you,

that it is not necessary to the application of that rule that the corroboration should be as to all or the entire testimony of the accomplice. It is sufficient to satisfy the rule to which I have adverted and as to which I have just advised you if he be corroborated by other testimony in any one or more of the material elements or particulars of this evidence relating to some one or more of the material elements of the crime. It is not necessary, in other words, that his entire story and testimony should be corroborated.

So I say to you, gentlemen of the jury, that it is for you to weigh the testimony. The credibility of these witnesses is for you. You are to bear in mind my caution as to the testimony of an accomplice. You will bear in mind what I have said as to your right even though that testimony is not corroborated. You will bear in mind what I have said if you find it to be corroborated. It is for you to say whether or not you find from this evidence beyond a
346 reasonable doubt that any one or more or all of these defendants are guilty or not guilty.

You understand that I am not undertaking to tell you what you shall find, but if the evidence, under the instructions I have given you, warrants it, you may find all of the defendants guilty or not guilty, or you may find the defendant Wagenknecht guilty and the other two defendants not guilty. You may find also Baker and Wagenknecht guilty and you may find the defendant Ruthenberg not guilty, just as you may find all of them guilty, and you may change or reverse the order and find as to the guilt or innocence of any one or more of them as you feel justified under the evidence in doing.

I have stated to you that the crime charged against the defendants is that they aided, abetted, commanded, counseled and induced Schue is violate the law. It is necessary that you should find this beyond a reasonable doubt, from what the evidence shows to have taken place in the presence of Schue and from what these persons so communicated to Schue, that he was thereby caused and procured to commit this crime. Evidence of what these defendants did, any one or all of them did, outside of the presence of Schue and not communicated by them to Schue, is not to be weighed by you in determining whether or not the defendants, any one or more of them, is guilty of a crime. The evidence that I have permitted to go to you on that subject, as I have already charged you, is limited to the respect stated at the time it was introduced, and for
347 the purpose of, in one or two instances, affecting the credibility of the testimony.

Now, gentlemen of the jury, you will be furnished with two different forms of verdict which are so phrased with blanks therein that it will be possible to return your *b*erdict or verdicts in the form in which I have indicated, that is, finding all guilty or not guilty, one or more guilty or not guilty, and so forth. When you retire to your room, you will select your foreman and when you have agreed upon your verdict you will advise the bailiff; and you will be brought into court and your verdict will be received by me.

The Court: Is there anything that either counsel wish to request the Court to give in charge which I have not done?

Mr. Sharts: No, if your Honor please.

Mr. Kavanagh: I have a request to make on reasonable doubt. I have the form that is adopted by this Court and has been followed by the Supreme Court, and I request it at this time.

The Court: If counsel for the defendants joins in that further request I will give it. If counsel for defendants does not, I will not amplify the charge on that subject.

Mr. Sharts: We are quite satisfied to have it read.

348 The Court: Counsel for the defendants joins in the request that I define to you further reasonable doubt. What is a reasonable doubt? A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the mind of a juror. You will be justified, and are required, to consider a reasonable doubt as existing if material facts, without which guilt cannot be established, may be fairly reconciled with innocence. In human affairs absolute*ly* certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious, ingenious or artificial doubt is of no avail. You will look then to all the evidence, and if that satisfies you of the defendants' guilt, you will say so. If you are not wholly satisfied and find only that there are strong probabilities of guilt, your only safe course is to acquit.

Mr. Sharts, it has been the rule in this court that the exceptions to the charge have to be taken before the jury retires.

Mr. Sharts: We have no exceptions to enter.

349 Thereupon the jury retired and in due time returned into court with its verdict, which said verdict was a verdict finding the defendants guilty as charged in the indictment, as appears of record herein.

Thereafter, and within three days from the rendering of said verdict the defendants duly filed their written motion for a new trial, as appears of record herein, and also duly filed their written motion in arrest of judgment, as appears of record herein.

Thereafter, this matter coming on to be heard, upon the said motion for a new trial and affidavits filed in support thereof, the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Thereupon the matter coming on to be heard upon the motion in arrest of judgment filed by the defendants herein, the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Thereupon the court pronounced sentence and entered judgment against the defendants herein; to which action of the court the defendants thereupon duly excepted.

Now come the defendants and presents to the court this, their bill

of exceptions in narrative form, and, upon consideration thereof, the court finds that the foregoing bill of exceptions, together with the exhibits hereto attached and made part hereof, is a true, correct and complete bill of exceptions, and the same is hereby allowed and signed this 21 day of August, 1917.

D. C. WESTENHAVER,
District Judge.

350 GOVERNMENT'S EXHIBIT No. 1.

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

Filed Jul. 21, 1917, at — o'clock — M. B. C. Miller, Clerk, U. S. District Court, N. D. O.
Gov. Ex. 1. F. H. R.

(Here follow fac-simile leaflets marked pages 351 and 352.)

Down With Conscription

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE.

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in a war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesman, said this of conscription in the Congress of this country, Dec. 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents . . . . compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and fearful aspect to trample down and destroy the dearest right of personal liberty"?

JUL 21 1917
A. o'clock M.
E. C. MILLER, Clerk.
U. S. District Court. N. D. O.

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalists of this country, should

REFUSE TO REGISTER FOR CONSCRIPTION

The Socialist party of Cleveland has shown the way in the fight against conscription by adoption of this resolution:

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party

SOCIALIST PARTY OF OHIO—1291 Cook Ave., Lakewood, O.

F
At
U

YOUNG MEN

are you going to

REFUSE TO REGISTER

for military service in a foreign country

WHILE THE RICH MEN

who have brought on this war

STAY AT HOME

and get richer by gambling in food stuffs?

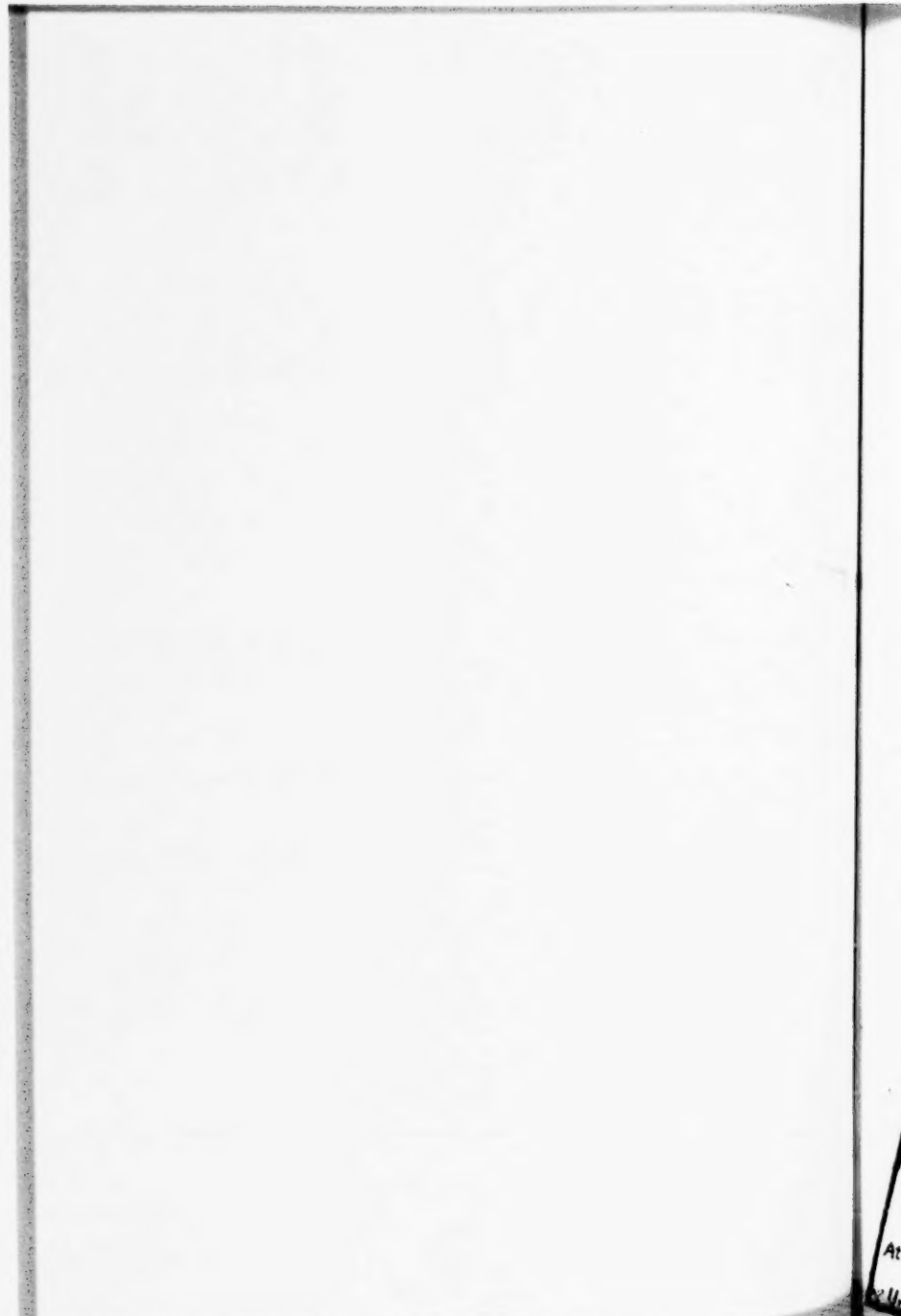
FILED
APR 21 1917
At ___ o'clock ___ M.
E. C. MILLER, Clerk
U. S. District Court. N. D. O.

We would rather die, or be imprisoned, for the sake of justice, than kill our fellow men in this unjust war.

SIGNED,

Young Men's Anti-Militarist League

Govt Ex 3



PROCLAMATION and WAR PROGRAM

The Socialist Party of the United States in the present grave crisis, solemnly reaffirms its allegiance to the principle of internationalism and working class solidarity the world over, and proclaims its unalterable opposition to the war just declared by the government of the United States.

Modern wars as a rule have been caused by the commercial and financial rivalry and intrigues of the capitalist interests in the different countries. Whether they have been frankly waged as wars of aggression or have been hypocritically represented as wars of "defense", they have always been made by the classes and fought by the masses. Wars bring wealth and power to the ruling classes, and suffering, death and demoralization to the workers.

They breed a sinister spirit of passion, unreason, race hatred and false patriotism. They obscure the struggles of the workers for life, liberty and social justice. They tend to sever the vital bonds of solidarity between them and their brothers in other countries, to destroy their organizations and curtail their civic and political rights and liberties.

The Socialist Party of the United States is unalterably opposed to the system of exploitation and class rule which is upheld and strengthened by military power and sham national patriotism. We, therefore, call upon the workers of all countries to refuse support to their governments in their wars. The wars of the contending national groups of capitalists are not the concern of the workers. The only struggle which would justify the workers in taking up arms is the great struggle of the working class of the world to free itself from economic exploitation and political oppression, and we particularly warn the workers against the snare and delusion of defensive warfare. As against the false doctrine of national patriotism we uphold the ideal of international working-class solidarity. In support of capitalism, we will not willingly give a single life or a single dollar; in support of the struggle of the workers for freedom we pledge our all.

The mad orgy of death and destruction which is now convulsing unfortunate Europe was caused by the conflict of capitalist interests in the European countries.

In each of these countries, the workers were oppressed and exploited. They produced enormous wealth but the bulk of it was withheld from them by the owners of the industries. The workers were thus deprived of the means to repurchase the wealth which they themselves had created.

The capitalist class of each country was forced to look for foreign markets to dispose of the accumulated "surplus" wealth. The huge profits made by the capitalists could no longer be profitably reinvested in their own countries, hence, they were driven to look for foreign fields of investment. The geographical boundaries of each modern capitalist country thus became too narrow for the industrial and commercial operations of its capitalist class.

READ NOTICE ON LAST PAGE.

FILED
JUL 21 1917
o'clock M.
C. MILLER, Clerk.
District Court

FILED
JUL 21 1917
o'clock M.
C. MILLER, Clerk.
U. S. District Court

FILED
JUL 21 1917
o'clock M.
C. MILLER, Clerk.
District Court

Defendants Ex 1

The efforts of the capitalists of all leading nations were therefore centered upon the domination of the world markets. Imperialism became the dominant note in the politics of Europe. The acquisition of colonial possessions and the extension of spheres of commercial and political influence became the object of diplomatic intrigues and the cause of constant clashes between nations.

The acute competition between the capitalist powers of the earth, their jealousies and distrusts of one another and the fear of the rising power of the working class forced each of them to arm to the teeth. This led to the mad rivalry of armament, which, years before the outbreak of the present war, had turned the leading countries of Europe into armed camps with standing armies of many millions, drilled and equipped for war in times of "peace."

Capitalism, imperialism and militarism had thus laid the foundation of an inevitable general conflict in Europe. The ghastly war in Europe was not caused by an accidental event, nor by the policy or institutions of any single nation. It was the logical outcome of the competitive capitalist system.

The six million men of all countries and races who have been ruthlessly slain in the first thirty months of this war, the millions of others who have been crippled and maimed, the vast treasures of wealth that have been destroyed, the untold misery and sufferings of Europe, have not been sacrifices exacted in a struggle for principles or ideals, but wanton offerings upon the altar of private profit.

The forces of capitalism which have led to the war in Europe are even more hideously transparent in the war recently provoked by the ruling class of this country.

When Belgium was invaded, the government enjoined upon the people of this country the duty of remaining neutral, thus clearly demonstrating that the "dictates of humanity", and the fate of small nations and of democratic institutions were matters that did not concern it. But when our enormous war traffic was seriously threatened, our government calls upon us to rally to the "defense of democracy and civilization."

Our entrance into the European war was instigated by the predatory capitalists in the United States who boast of the enormous profit of seven billion dollars from the manufacture and sale of munitions and war supplies and from the exportation of American food stuffs and other necessaries. They are also deeply interested in the continuance of war and the success of the allied arms through their huge loans to the governments of the allied powers and through other commercial ties. It is the same interests which strive for imperialistic domination of the Western Hemisphere.

The war of the United States against Germany cannot be justified even on the plea that it is a war in defense of American rights or American "honor." Ruthless as the unrestricted submarine war policy of the German government was and is, it is not an invasion of the rights of the American people as such, but only an interference with the opportunity of certain groups of American capitalists to coin cold profits out of the blood and sufferings of our fellow men in the warring countries of Europe.

It is not a war against the militarist regime of the Central Powers. Militarism can never be abolished by militarism.

It is not a war to advance the cause of democracy in Europe. Democracy can never be imposed upon any country by a foreign power by force of arms.

It is cant and hypocrisy to say

that the war is not directed against the German people, but against the Imperial Government of Germany. If we send an armed force to the battlefields of Europe, its cannon will mow down the masses of the German people and not the Imperial German Government.

Our entrance into the European conflict at this time will serve only to multiply the horrors of the war, to increase the toll of death and destruction and to prolong the fiendish slaughter. It will bring death, suffering and destitution to the people of the United States and particularly to the working class. It will give the powers of reaction in this country the pretext for an attempt to throttle our rights and to crush our democratic institutions, and to fasten upon this country a permanent militarism.

The working class of the United States has no quarrel with the working class of Germany or of any other country. The people of the United States have no quarrel with the people of Germany or any other country. The American people did not want and do not want this war. They have not been consulted about the war and have had no part in declaring war. They have been plunged into this war by the trickery and treachery of the ruling class of the country through its representatives in the National Administration and National Congress, its demagogic agitators, its subsidized press, and other servile instruments of public expression.

We brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world.

In all modern history there has been no war more unjustifiable than the war in which we are about to engage.

No greater dishonor has ever been forced upon a people than that which the capitalist class is forcing upon this nation against its will.

In harmony with these principles, the Socialist Party emphatically rejects the proposal that in time of war the workers should suspend their struggle for better conditions. On the contrary, the acute situation created by war calls for an even more vigorous prosecution of the class struggle, and we recommend to the workers and pledge ourselves to the following course of action:

1. Continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.

2. Unyielding opposition to all proposed legislation for military or industrial conscription. Should such conscription be forced upon the people, we pledge ourselves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription. We pledge ourselves to oppose with all our strength any attempt to raise money for payment of war expense by taxing the necessaries of life or issuing bonds which will put the burden upon future generations. We demand that the capitalist class, which is responsible for the war, pay its cost. Let those who kindled the fire furnish the fuel.

3. Vigorous resistance to all reactionary measures, such as censorship of press and mails, restriction of the rights of free speech, assemblage, and organization, or compulsory arbitration and limitation of the right to strike.

4. Consistent propaganda against miltary training and militaristic teaching in the public schools.

5. Extension of the campaign of education among the workers to organize them into strong, class-conscious, and closely unified politi-

cal and industrial organizations, to enable them by concerted and harmonious mass action to shorten this war and to establish lasting peace.

6. Widespread, educational propaganda to enlighten the masses as to the true relation between capitalism and war, and to rouse and organize them for action, not only against present war evils, but for the prevention of future wars and for the destruction of the causes of war.

7. To protect the masses of the American people from the pressing danger of starvation which the war in Europe has brought upon them, and which the entry of the United States has already accentuated, we demand:

(a) The restriction of food exports so long as the present shortage continues, the fixing of maximum prices, and whatever measures may be necessary to pervent the food speculators from holding back the supplies now in their hands;

(b) The socialization and democratic management of the great industries concerned with the production, transportation, storage, and the marketing of food and other necessaries of life;

(c) The socialization and democratic management of all land and other natural resources now held out of use for monopolistic or speculative profit.

These measures are presented as means of protecting the workers against the evil results of the present war. The danger of recurrence of war will exist as long as the capitalist system of industry remains in existence. The end of wars will come with the establishment of socialized industry and industrial democracy the world over. The Socialist Party calls upon all the workers to join it in its struggle to reach this goal, and thus bring into the world a new society in which peace, fraternity, and human brotherhood will be the dominant ideals.

DEMONSTRATION

FOR PEACE AND AGAINST CONSCRIPTION

Public Square

Sunday, May 6th, 2:30 P. M.

GOOD SPEAKERS.

Make your voice heard for peace and against Prussianizing this country.

Subscribe to The American Socialist, issued by the National Office of the Socialist Party, 803 West Madison Street, Chicago, Ill., 50c per year; 25c for six months.

353 GOVERNMENT'S EXHIBIT No. 4.

Lakewood, Ohio,

May 25, 1917.

Postmaster, East Palestine, Ohio.

DEAR SIR: About a week ago two packages of printed matter were addressed to the East Palestine, post office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened.

I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio. If this is not done, and if by tracing we can find that you interfered with the delivery of this second package to the addressee, we shall immediately refer the case to our attorney and institute the proper proceedings.

Yours respectfully,

A. WAGENKNECHT,
State Secretary.

Sufficient postage for forwarding the package is enclosed.

Filed Jul. 21, 1917, at — o'clock — M. B. C. Miller, Clerk, U. S. District Court, N. D. O.
Govt.'s Ex. 4. F. H. R.

(Here follows fac-simile circular marked page 354.)

355 Government's Exhibit No. 27, being a package addressed to A. A. Hennacy, General Delivery, East Palestine, Ohio, about twelve inches in height, about twelve inches in width, and about eighteen inches in length, the contents thereof being printed dodgers or circulars headed "Down with Conscription" and at the bottom of the aforesaid printed dodgers or circulars there appearing words and phrases of the following tenor: "One of the millions of leaflets issued by the Socialist Party—Socialist Party of Ohio—1291 Cook Ave., Lakewood, Ohio," the said package and the contents thereof being wrapped with brown wrapping paper, and the circulars contained in the package as aforesaid being set forth herein in full, reads as follows:

Down With Conscription.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

Conscription is the Worst Form of Involuntary Servitude.

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in a war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesman, said this of conscription in the Congress of this country, Dec. 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents * * * compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest right of personal liberty?"

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalists of this country, should

Refuse to Register for Conscription.

The Socialist party of Cleveland has shown the way in the fight against conscription by adoption of this resolution:

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party.

SOCIALIST PARTY OF OHIO.

1291 Cook Ave., Lakewood, O.

356 *Petition for Writ of Error.*

(Filed July 25, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

Petition for Writ of Error.

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, by Morris H. Wolf and Joseph W. Sharts, their attorneys, and say that on the 25th day of July, A. D. 1917, this Court entered judgment herein against these defendants, in which judgment and the proceedings, had, prior thereto in this cause, certain errors were committed, to the prejudice of these defendants, involving a construction of the Constitution of the United States, all of which will more fully appear in the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors so complained of, and that transcript

of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

CHARLES E. RUTHENBERG,
ALFRED WAGENKNECHT,
CHARLES BAKER,
Defendants.
MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

357 *Assignment of Error.*

(Filed July 25, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

Assignment of Error.

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, and plaintiffs in error, and each for himself and jointly make and file this, their assignment of error:

1. The trial Court erred in requiring these defendants to present evidence to support their challenges to the grand and petit jury arrays without any demurrer or answer or exceptions filed thereto by the prosecution.

2. The trial Court erred in refusing to admit the testimony of R. E. Miller, Clerk of the Court, to show that he was an adherent of the Republican Party, that the other jury commissioner, George S. May, was a member of the Democratic Party, and that the Socialist Party, of which defendants were members and officers, was a minor political party within the District and was without representation on the jury board; contrary to their constitutional right to an impartial jury.

3. The Trial Court erred in refusing to admit the testimony — the Clerk of Cuyahoga County Board of Elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic Parties, and for that and other
358 reasons hostile to and prejudiced against these defendants as members of the Socialist Party; and that there were and are numerous persons in said District qualified to serve on said

juries, who are members of the Socialist Party, but are excluded from such service by reason of their adherence to said party; contrary to defendants' right to an impartial jury and the equal protection of the law and due process of the law, and contrary to Sec. 276 Judicial Code and the grant of equal rights under the Act of May 31st, 1870, c. 114, Sec. 16.

4. The Trial Court erred in refusing to admit said testimony offered for the purpose of showing that the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of land-owners, property-owners, and capitalists, and that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners and capitalists and that defendants are all proletarians, that is to say, landless and propertyless wage workers, who as Socialists advocate the rights of proletarians as opposed to landlords, employers and capitalists, and urge the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury box; and that said jurors so drawn are and of necessity must be, by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition; and that there were many thousands of persons in said District qualified to serve on said juries who do not derive their income from Rent, Interest or Profit and would therefore not be rendered hostile to and prejudiced against defendants
359 because of private interests, but that said persons are excluded from said jury service; contrary to the constitutional rights of defendants as above set forth.

5. The Trial Court erred in refusing to sustain said challenge on the ground that the juries were selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

6. The Trial Court erred in refusing to sustain the challenge on the ground that the jury box from which were drawn the names for said juries had not been emptied at any time within recent years nor refilled since November, 1916, many months prior to said drawings, that no evidence was obtainable of the number — qualified names in said jury box at the time of said drawings, and in fact said box did not, at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, Sec. 276; and that many of the names in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who had not held office for more than a year prior to said drawings; and that of the persons sitting on said alleged grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three had been so selected and their names put in said box by said Sullivan; contrary to Sec. 276 Judicial Code.

7. The Trial Court erred in refusing to sustain said challenge on the ground that the Marshal and his Deputy, who served the writs

of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and Political adversaries of the defendants,
360 and in refusing to admit the testimony of said Marshal, Charles W. Lapp; that he was a member of the Democratic Party.

8. The Trial Court erred in refusing to sustain said challege on the ground that said Marshal did not summon nor return the entire venire of 30 names for grand jury service as required by order of the Court and as drawn by the Clerk, but only 19 thereof; and had made no return of the venire for the petit jury drawn for service after said grand jury was drawn.

9. The Trial Court erred in refusing to sustain said challenge on the ground that the jury box used for said drawings, was small and rectangular, and incapable of being rotated so as to mingle the names and that there was in fact, no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box the names for these proceedings; and that said Clerk, did in fact, select from said box the names exclusively of adherents of the political parties adverse to that of defendants, said adherents being persons likely to be and in fact hostile to and prejudiced against these defendants; contrary to the defendants' constitutional right of due process of law and of trial by an impartial jury of their peers.

10. The Trial Court erred in refusing to sustain said challenge on the ground that all of said jurors, both inside and outside the City of Cleveland, were summoned by mail, and that the actual delivery of the summons in such cases was not by any official of the Court or other qualified person, but by a person unknown, to wit, a letter carrier; and that in four instances the registry card which was returned had not been signed by the person summoned but by someone else; and that of the said grand jurors so
361 summoned by mail seven were designated not by their Christian names but by initial only, and the summons mailed not to any street number but simply to the Town or City, where such person was believed to reside; and that 9 of the persons summoned by mail for the petit jury, were designated in the same manner; that by reason of these neglects of all safe-guards both as to the manner of serving the summons and the identity of the persons so summoned defendants were deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

11. The Trial Court erred in refusing to sustain the challenge on the ground that the Clerk, without an order of the Court, directing him to select any parts of said Division, in drawing the names for said grand jury did not draw any names from 7 of the Counties of the Division but drew 6 from Cuyahoga County; and in drawing the names for said petit jury the Clerk, without an order of Court, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but drew none from 8 counties, within said Division; contrary to Sec.

277 Judicial Code and the constitutional right of defendants to be tried by an impartial jury of the State and District.

12. The Trial Court erred in failing to sustain said challenge in any or all of its counts and in overruling same.

13. The Trial Court erred in refusing to sustain the defendants' "motion to quash" on the ground that one D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without any one of such names having been selected or summoned.

14. The Trial Court erred in overruling said motion to
362 quash on the ground that said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

15. The Trial Court erred in overruling said motion to quash on the ground that endorsements, not provided by law, and prejudicial to defendants, were placed on the back of said indictment, to-wit, the signature of the District Attorney beneath the signature of the foreman of the grand jury.

16. The Trial Court erred in overruling said motion on the ground that the indictment failed to show that the events constituting the alleged offense occurred before the sitting of said grand jury and before the finding of said indictment.

17. The Trial Court erred in overruling said motion on the ground that the indictment fails to show that the grand jurors were of the necessary qualifications, were of the body of the State and District, and sitting within the District, or of the jurors who found the indictment.

18. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said Alphons J. Schue, was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen, at the time said offense is alleged to have been committed.

19. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said proclamation had been published at the time said offense is alleged to have been committed, by these defendants, or was ever published.

363 20. The Trial Court erred in overruling said motion on the ground that said indictment fails to negative the possible appointments provided in Subdivision Third, of Section 1 of the Draft Act.

21. The Trial Court erred in overruling said motion on the ground that said indictment alleges three separate offenses in one count.

22. The Trial Court erred in overruling said motion on the ground that said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce and procure said Schedule to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

23. The Trial Court erred in overruling said motion on the ground that these defendants are charged therein as accessories to a misdemeanor.

24. The Trial Court erred in refusing to permit the filing of defendants' plea in abatement and refusing to hear the several grounds set forth therein, namely:

(*a*) That the names placed in the jury box from which these juries were drawn had been selected and put there by jury commissioners appointed on partisan consideration and *and* from only the Democratic and Republican Parties, and without any representative of the Socialist Party; that said jury commissioners were hostile to these defendants;

(*b*) That all the names so selected and put in the jury box were the names of adherents of the Republican and Democratic Parties exclusively and that the names of members of the Socialist Party had been excluded from said box because of their political affiliation;

364 (*c*) That the names so selected and put in said jury box had been taken exclusively, or almost exclusively, from the names of land-owners, property-owners, capitalists and employers, and the names drawn from said box for these juries were the names exclusively of land-owners, property-owners capitalists and employers, who by reason of their private interests were hostile to and prejudiced against these defendants;

(*d*) That said juries had been selected and drawn from only a part of the Northern District of Ohio, instead of the entire District;

(*e*) That the jury box had not been emptied at any time within recent years, nor re-filled since November, 1916, many months before said drawings, and said box did not at the time of said drawing, contain the names of 300 qualified persons; that many of the names therein had been selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings; that three of the persons on said grand jury had been so selected by Sullivan and 3 on the petit jury.

(*f*) That the Clerk of the Court in the presence of the Marshal, both being political adversaries of these defendants and opposed to and prejudiced against them had selected from the box the names for jury service, and said names had been selected exclusively from adherents of the Republican and Democratic Parties who were likely to be and in fact were hostile to and prejudiced against these defendants; in violation of defendants' constitutional right of due process of law and trial by an impartial jury;

(*g*) That said Marshal and his Deputy, who served the writs of venire for both of said juries were not "indifferent persons," but active partisans of the Democratic Party and political adversaries of these defendants;

365 (*h*) That said Marshal did not summon the 30 men for grand jury service as ordered by the Court and drawn by the Clerk, but selected and summoned only 19 thereof;

(*i*) That all persons summoned for said grand and petit juries

were summoned by mail, including several residents of Cleveland, Ohio;

(*j*) That one D. E. Grager was sworn as a grand juror, no such name having been drawn from the jury box, nor any one of that name summoned;

(*k*) That the Clerk in drawing the grand jury, drew 6 from Cuyahoga County alone and none from seven of the counties; and in drawing the petit jury Clerk, without any order of the Court, directing such selection, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but none from eight counties, in violation of Sec. 277 Judicial Code, and the constitutional right of defendants to an impartial jury of the State and District.

(*l*) That said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case;

(*m*) That said grand jurors were not of the necessary qualifications were not of the body of the State and District, nor properly constituted a grand jury.

25. The Trial Court erred in overruling a demurrer on the ground that the facts set forth therein do not constitute an offense against the laws of the United States.

366 26. The Trial Court erred in overruling said demurrer on the ground that the indictment charges these defendants with being accessories to a misdemeanor;

27. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege the events or acts as occurring prior to the finding of the indictment.

28. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege that it was presented by a grand jury, "duly impaneled and sworn," and in, of, and for the District.

29. The Trial Court erred in overruling the demurrer on the ground that the Act of May 18th, 1917, known as the Draft Act, and the Proclamation of said date, were unconstitutional on the following grounds:

(*a*) Said Act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;

(*b*) Said Act deprives men of their liberty without due process of law in violation of Amendment V of the United States Constitution;

(*c*) Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;

(*d*) Said Act violates Article 1 Section 8 Clause 15 of the United States Constitution;

(*e*) Said Act violates Article 1, Section 8, Clause 16 of the United States Constitution;

(*f*) Said Act in Section IV thereof, violates Article 3, Section 1 and Article 1, Section 8, Clause 9 of the United States Constitution;

(*g*) Said Act violates Article II, Section 2 of the United States Constitution;

(*h*) Said Act violates Article 10 of the amendments of the United States Constitution;

367 (*i*) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in the Preamble of the United States Constitution.

30. The Trial Court erred in refusing to grant to these defendants separate trials, because under the circumstances it was impossible to introduce evidence as to one of the defendants without thereby prejudicing all as members of the said political organization.

31. The Trial Court erred in overruling defendants' challenge to the petit jury array, made after examination, on the ground that the defendants had been misled as to what jury would try the case, and that said panel had been drawn before the grand jury which brought in the indictment.

32. The Court erred in admitting, as against the defendants, over their objection and exception, certain testimony of the witness, Alphons J. Schue, in substance as follows:

Q. When did you first learn of the conscription law or the registration law?

A. I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please, the Act under which this indictment is drawn was passed on a certain date (May 18th) and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that subject to certain restrictions, but the question is not open to objection on that ground.

Q. On the 20th of May, and prior thereto, what was his intent and purpose with respect to the registration provisions of that law?

368 The objection would be overruled. (Exception by defendants.)

A. I would have certainly registered if I had not heard about these Socialist Peace Meetings.

33. The Court erred in admitting the said testimony as against defendants, Ruthenberg and Wagenknecht.

34. The Court erred in admitting testimony over the objection and exception of defendants, as against the defendants, Ruthenberg and Wagenknecht, regarding the speech of Charles Baker of May 20th, in substance as follows:

Q. Now do you recall what Baker said on the 20th of May, 1917, in substance, Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say that you can recall?

A. And he told about the standpoint of the Socialist Party, the

way they voted against conscription and that it was taken by the Local here that all Socialists would refuse to register.

Q. What is the last part of the answer?

A. That all Socialists would refuse to register and induce others, telling them that they would have the full support of the Socialist Party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory, I will ask you if you recall if he said anything about himself registering personally?

Mr. Sharts: I object to putting a suggestion like that in the question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance what you remember as to Mr. Baker's speech on the 20th of May at the Public Square. Is that correct?

369 The Witness: Yes, sir.

The Court: You may put the question, Mr. Wertz. (Exception by defendant-.)

The Witness: He said he would refuse to register, he being of military age.

Q. Do you know whether or not, he did, in fact register?

Mr. Sharts: I object.

The Court: The objection to that will be sustained.

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney, anything in addition to what has already been said what Mr. Baker said on the subject with reference to being shot before registering. (Exception by defendant-.)

A. He said he would rather be shot here as a man than shot in the trenches of Europe as a dog.

35. The Court erred in admitting evidence of the speeches of Wagenknecht and Ruthenberg on May 27th as against Baker, and in overruling the motion for a new trial based on that point.

36. The Court erred in refusing the request of defendants, that the testimony of James L. Lind, as follows, be stricken out:

Question by Mr. Sharts: This statement that you refer to, was it at the police station?

A. Yes, in the Police Inspector's office.

Q. Was Mr. Schue present?

A. I don't think so. I don't know Mr. Schue.

379 Mr. Sharts: If your Honor please, I am going to ask to have the testimony of this witness, with regard to any admis-

sions made by Mr. Wagenknecht, at the police station, stricken out, as not having been made in the presence of Mr. Schue.

The Court: I will overrule your request and you may have your exception but I will make this statement in addition to that.

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony made by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

37. The Court erred in admitting the introduction of evidence by Wilbur D. Bacon, and permitting the introduction of a leaflet purporting to have been approved at a meeting attended by the said Wilbur D. Bacon, on May 13th, 1917, and at which meeting defendants, Ruthenberg and Wagenknecht were present, on the ground that the said leaflet was alleged to have been approved by some of defendants on May 13th or five days prior to the passage of the Act.

38. The Trial Court erred in refusing to permit these defendants to rebut evidence of intent by producing evidence that they had constantly advised registration when inquired of.

39. The Trial Court erred in refusing to direct a verdict for the defendants or any one of them or two of them at the close of the plaintiff's testimony, there having been *so* corroborative evidence offered to support the statements of defendant Schue, who was an alleged accomplice.

371 40. The Trial Court erred in not directing a verdict for the defendants at the close of all the testimony, for the same reason.

41. The Trial Court erred in overruling the motion of the defendants for a new trial for the reasons therein given, and particularly on the ground of newly discovered evidence tending to show that Schue perjured himself on the witness stand in saying that he had had no connection with the Socialist organization other than to attend the meetings of May 20th and May 27th.

42. The Trial Court erred in overruling the motion in arrest of judgement for the reasons therein given, wherefore the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, each for himself and jointly pray that the judgment and sentence herein may be reversed and held for naught.

CHARLES E. RUTHENBERG,
ALFRED WAGENKNECHT,
CHARLES BAKER,
MORRIS H. WOLF,
JOSEPH W. SHARTS,
Attorneys for Defendants.

372 *Amended Assignment of Error.*

(Filed July 31, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendant-.

Amended Assignment of Error.

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, and plaintiffs in error, and each for himself and jointly make and file this, their assignment of error:

1. The Trial Court erred in requiring these defendants to present evidence to support their challenges to the grand and petit jury arrays without any demurrer or answer or exceptions filed thereto by the prosecution.

2. The Trial Court erred in refusing to admit the testimony of B. C. Miller, Clerk of the Court, to show that he was an adherent of the Republican Party, that the other jury commissioner, George S. May, was a member of the Democratic Party, and that the Socialist Party, of which defendants were members and officers, was a minor political party within the District and was without representation on the jury board; contrary to their constitutional right to an impartial jury.

3. The Trial Court erred in refusing to admit the testimony — the Clerk of Cuyahoga County Board of Elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic Parties, and for that and other reasons, hostile to and prejudiced against these defendants as members of the Socialist Party; and that there were and are numerous persons
373 in said District qualified to serve on said juries, who are members of the Socialist Party, but are excluded from such service by reason of their adherence to said party; contrary to defendants' right to an impartial jury and the equal protection of the law and due process of the law, and contrary to Sec. 276 Judicial Code and the grant of equal rights under the Act of May 31st, 1870, C. 114, Sec. 16.

4. The Trial Court erred in refusing to admit said testimony offered for the purpose of showing that the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of land-owners, property-owners, and capitalists, and that the

names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners and capitalists and that defendants are all proletarians, that is to say, landless and propertyless wage workers, who as Socialists advocate the rights of proletarians as opposed to landlords, employers and capitalists, and urge the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury box; and that said jurors so drawn are and of necessity must be, by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition; and that there were many thousands of persons in said District qualified to serve on said juries who do not derive their income from Rent, Interest or Profit and would therefore not be rendered hostile to and prejudiced against defendants because of private interests, but that said persons are excluded from said jury service; contrary to the constitutional rights of defendants as above set forth.

374 5. The Trial Court erred in refusing to sustain said challenge on the ground that the juries were selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

6. The Trial Court erred in refusing to sustain the challenge on the ground that the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor refilled since November, 1915, many months prior to said drawings, that no evidence was obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not, at the time of said drawings, contain the names of 300 qualified persons as required by Judicial Code, Sec. 276; and that many of the names in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who had not held office for more than a year prior to said drawings; and that of the persons sitting on said alleged grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three had been so selected and their names put in said box by said Sullivan; contrary to Sec. 276 Judicial Code.

7. The Trial Court erred in refusing to sustain said challenge on the ground that the Marshal and his Deputy, who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, and in refusing to admit the testimony of said Marshal, Charles W. Lapp, that he was a member of the Democratic Party.

375 8. The Trial Court erred in refusing to sustain said challenge on the ground that said Marshal did not summon nor return the entire venire of 30 names for grand jury service as required by order of the Court and as drawn by the Clerk, but only 19 thereof; and has made no return of the venire for the petit jury drawn for service after said grand jury was drawn.

9. The Trial Court erred in refusing to sustain said challenge on

the ground that the jury box used for said drawings, was small and rectangular, and incapable of being rotated so as to mingle the names and that there was in fact, no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box the names for these proceedings; and that said Clerk, did in fact, select from said box the names exclusively of adherents of the political parties adverse to that of defendants, said adherents being persons likely to be and in fact hostile to and prejudiced against these defendants; contrary to the defendants' constitutional right of due process of law and of trial by an impartial jury of their peers.

10. The Trial Court erred in refusing to sustain said challenge on the ground that all of said jurors, both inside and outside the City of Cleveland, were summoned by mail, and that the actual delivery of the summons in such cases was not by any official of the Court or other qualified person, but by a person unknown, to wit, a letter carrier; and that in four instances the registry card which was returned had not been signed by the person summoned but by some one else; and that of the said grand jurors so summoned by mail seven were designated not by their Christian names but by initial only, and the summons mailed not to any street number but
376 simply to the Town or City, where such person was believed to reside; and that 9 of the persons summoned by mail for the petit jury, were designated in the same manner; that by reason of these neglects of all safe-guards both as to the manner of serving the summons and the identity of the persons so summoned defendants were deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

11. The Trial Court erred in refusing to sustain the challenge on the ground that the Clerk, without an order of the Court, directing him to select any parts of said Division, in drawing the names for said grand jury, did not draw any names from 7 of the Counties of the Division but drew 6 from Cuyahoga County; and in drawing the names for said petit jury, the Clerk, without an order of Court, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but drew none from 8 counties, within said Division; contrary to Sec. 277 Judicial Code and the constitutional right of defendants to be tried by an impartial jury of the State and District.

12. The Trial Court erred in failing to sustain said challenge in any or all of its counts and in overruling same.

13. The Trial Court erred in not requiring the prosecution to file, either an answer or a demurrer to defendant-' challenge to the array, as is evident from the following testimony:

(By Mr. Sharts:)

Q. If your Honor please, there has been nothing filed in the District Attorney's office, either in the way of a demurrer or an exception, or an answer and for that reason, we have been unable to state that an issue has been made up.

The Court: No issues are required. No answer is required.
377 No exception is required. They may object to the sufficiency of the affidavit if they wish to submit it that way instead of to present such evidence as they may see fit to present.

Mr. Sharts: If your Honor will permit me, I will take an exception. Enter an exception to the ruling of the Court.

The Court: An exception to what?

Mr. Sharts: An exception to the ruling of the Court that neither an answer or exceptions or a demurrer are required before testimony.

The Court: As I understand you, Mr. Sharts, as the matter now stands, you have no evidence to offer except the affidavit.

Mr. Sharts: If your Honor please, if we had understood that there was to be testimony introduced, that is, that the Court was ready to hear evidence, we would have had our subpenaes issued now. We would have subpenaed the Clerk of the Board of Elections, to produce his books and we had also intended to produce evidence from the outside towns in this District regarding the list of names of the jurors that have been selected for jury service and we are prepared to show that the statements in our challenge are true, but, as there has been no answer filed, we were not, of course, looking for a presentation of evidence this afternoon. We supposed it would be on demurrer to the challenge.

The Court: No pleadings to a challenge to an array or panel are required. They stand in the same was as a challenge to a juryman who is being paroled and its trial by the Court without any formality.

14. The Trial Court erred in not sustaining the challenge of defendants on the ground that one of the jury commissioners was a resident of the Western Division and another jury commissioner had not been in office for some time prior to the impanelling
378 of this jury, and that therefore there were not sufficient names in the jury box at the time the names for the last jury were drawn, as is evident from the following testimony:

(By Mr. Sharts:)

Q. Mr. Clerk, state your name.

A. B. C. Miller.

Q. Your occupation?

A. Clerk of the United States District Court for the Northern District of Ohio.

Q. How long have you occupied that position?

A. Since December, 1909, of the District Court since January, 1912.

Q. Who have been the jury commissioners in conjunction with you, during your term of office?

A. Jeremiah J. Sullivan, of Cleveland, and George S. May, of Napoleon, Henry County, Ohio.

Q. When did Jeremiah J. Sullivan cease to be a jury commissioner?

A. Approximately a year ago. I can give you the exact date from my papers.

Q. I wish you would.

A. On August 4th, 1916, the resignation of J. J. Sullivan as jury commissioner for the Northern District of Ohio, was accepted and George S. May, Esquire, of Napoleon, Ohio, was appointed as jury commissioner in his stead.

Q. Do you know where Jeremiah J. Sullivan now resides?

A. I understand in Cleveland, Ohio.

Q. Still in Cleveland?

A. Yes, sir.

Q. And does George S. May, jury commissioner, reside in the Eastern Division of this Court?

A. No, he resides in the Western Division.

379 15. The Court erred in sustaining the objection of the District Attorney to a question by defendants, as is evident from the following testimony:

Q. What were the political principles of Mr. Sullivan?

Mr. Wertz: I object.

The Court: I think that I will sustain the objection to that question, but permit you to put the inquiry in the language of the statute. As to whether or not he was a member of the dominant political party, opposed that of the Clerk. I think that is the extent of the legitimate inquiry. I do not believe it is permissible to prove whether he was a prohibitionist, or Republican or Democrat or any other political party, that it was opposed to that of the Clerk's.

Mr. Sharts: Enter an exception to the ruling of the Court.

16. The Court erred in refusing the Clerk, B. C. Miller, to state the names of the principal political parties in the District; to state Miller's own political affiliation and to state what were the political affiliations of Mr. May, as is evident from the following testimony:

(By Mr. Sharts:)

Q. Can you give the names of the principal political parties in the District?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Exception.

Q. What is your political affiliation?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception.

Q. State whether or not Mr. Sullivan was a well-known member of a political party opposed to your own?

A. He was.

Q. Can you state how well-known?

The Court: Do you think that that is susceptible of an
380 answer, Mr. Sharts?

Mr. Sharts: I would suppose we were entitled to some concrete information on the subject.

The Court: No, I will of my own motion, sustain an objection to that.

Exception by defendant.

Q. Will you state Mr. Miller, what were the political affiliations of Mr. May?

Mr. Wertz: I object.

The Court: The objection will be sustained unless you make your question in the form I indicated a moment ago.

Mr. Sharts: Exception.

Q. State whether or not Mr. May was — the principal political party in the District opposed to that to which you yourself belong.

Mr. Wertz: I object. Did you say the principal or a principal?

The Court: I think that is drawn most too fine a sight. The question may be answered in that form.

A. He is.

Q. State whether or not he was a member of the same political party with Mr. Sullivan.

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic Party and that Mr. Miller is a member of the Republican Party, and that the Socialist Party is without representation on the jury board. This is the ground of exceptions in the previous questions.

381 17. The Trial Court erred in refusing defendants to show that the names of the grand and petit jurors were chosen from the names of partisans of the Republican and Democratic Parties, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used.

Mr. Wertz: I object.

The Court: I do not think that is a material line of inquiry, Mr. Sharts.

Mr. Sharts: Enter an exception because we expect to show by this witness that he has made use of the files of the Board of Elections and has drawn therefrom names of partisans of the Republican and Democratic Parties and excluded the names of adherents of the Socialist Party.

The Court: In view of that tender of proof, I will reverse the ruling and permit the question to be answered.

(Question read.)

A. I obtained the names by writing to the Common Pleas Judges of this Division for various Counties, and asking them to send me a list of men in their counties qualified to serve as jurors.

Q. Were the Common Pleas Judges to whom you sent this request, members of any political party?

Mr. Wertz: I object.

A. I should say——

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception, because we expect to show that the Common Pleas Judges to whom this witness applied for names, were all of them members of the Republican and Democratic Parties, and not of the Socialist Party.

382 18. The Court erred in refusing to permit B. C. Miller, to answer in what manner the list of names sent in by Common Pleas Judges, as testified to by him, were selected, as is evident from the following testimony:—

Q. Do you know in what manner the list of names that were sent to you from the Common Pleas Judges as you have described, have been selected?

A. Not in detail. Most of the Judges——

Mr. Wertz: I object to that question; it would be hearsay.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception.

19. The Court erred in refusing the Clerk to answer an- question that would show the proportions of names put in the jury box by Jeremiah J. Sullivan as is evident from the following testimony:—

Q. I will ask you to go through the card index, if you can, and give us a rough estimate of the proportion of names that are now in the jury box that were placed there by Mr. Sullivan?

A. I can do so.

The Court: I will sustain an objection to that part of it. I think when I have permitted you to establish that there were names there, I have given you the benefit of all that you are entitled to.

Mr. Sharts: Just enter an exception, on the ground that we expect to show by the proportion of names that a considerable number of names in the jury box now and at the time of the drawing and the Order of the Court were names placed there by Mr. Sullivan, and that such names are disqualified and that the remaining names did not constitute the required three hundred.

383 20. The Trial Court erred in refusing to permit an answer by B. C. Miller, Clerk, that would tend to establish the polit-

ical affiliation of the Marshal of the Court, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. Now, Mr. Miller, who is the Marshal of the Court?
A. Charles W. Lapp.
Q. And of what political affiliation?

The Court: I will sustain an objection to that.

Mr. Sharts: Enter an exception on the ground that by the sixth challenge we have charged that the Marshal and his Deputy, who served the writs of venire for both of said juries, were not "indifferent persons," but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland, and president of the City Council, and we expect to show by this line of questions that he was a political adversary of these defendants, at the time he served the writs of venire.

21. The Trial Court erred in refusing to sustain the defendants' motion to quash on the ground that one D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without any one of such name having been selected or summoned.

22. The Trial Court erred in overruling said motion to quash on the ground that the said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

384 23. The Trial Court erred in overruling said motion to quash on the ground that endorsements, not provided by law, and prejudicial to defendants, were placed on the back of said indictment, to-wit, the signature of the District Attorney beneath the signature of the foreman of the grand jury.

24. The Trial Court erred in overruling said motion on the ground that the indictment failed to show that the events constituting the alleged offense occurred before the sitting of said grand jury and before the finding of said indictment.

25. The Trial Court erred in overruling said motion on the ground that the indictment fails to show that the grand jurors were of the necessary qualifications, were of the body and the State and District, and sitting within the District, or of the jurors who found the indictment.

26. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said Alphons J. Schue was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen, at the time said offense is alleged to have been committed.

27. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said proclamation

had been published at the time said offense is alleged to have been committed, by these defendants, or was ever published.

28. The Trial Court erred in overruling said motion on the ground that said indictment fails to negative the possible appointments provided in Subdivision Third, of Section 1 of the Draft Act.

29. The Trial Court erred in overruling said motion on
385 the ground that said indictment alleges three separate offenses in one count.

30. The Trial Court erred in overruling said motion on the ground that said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce and procure said Schue to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

31. The Trial Court erred in overruling said motion on the ground that these defendants are charged therein as accessories to a misdemeanor.

32. The Trial Court erred in refusing to permit the filing of defendants' plea in abatement and refusing to hear the several grounds set forth therein, as is evident from the following testimony:—

The Court: Upon examining this plea in abatement, I perceive that it raises no questions which were not raised by the challenge to the array which was tried by the Court, and, on evidence presented, held not to be sufficient. If I am wrong, that is giving you one ground of error.

Mr. Kavanagh: Mr. Sharts says except as to the 15th ground.

The Court: I would not permit under any circumstances to be offered in support of the 15th allegation, nor proof to the contrary. There would be no way of disproving that except by violating the secrecy of the grand jury room. I was going to say that, if I am wrong, I have given you one ground of error, for which you announced you were looking.

386 Mr. Sharts: In what form are you refusing it?

The Court: I am going to refuse it on the objection to its filing. I am not going to permit it to be filed, and thereby give you the benefit of an additional proposed ground of error.

Mr. Kavanagh: If your Honor please, will you state for the benefit of the record, that there were two objections made by the Government: first, as to the right to file it after having filed the other pleadings, and second—

The Court: I would sustain it upon three grounds, if you wish. First, because it is tendered for the first time at too late a day. Second, because it is tendered after the Court had heard and tried a challenge to the array, both of the grand and petit juries, and this involves, so far as it is sufficient at all, the same grounds. Third, I sustain it on the ground that it is not sufficient in law as a plea in abatement. You may have your exceptions.

Mr. Sharts: Enter the exceptions for the defendants to the ruling of the Court.

33. The Trial Court erred in refusing to hear the several grounds set forth therein, viz.:

(*a*) That the names placed in the jury box from which these juries were drawn had been selected and put there by jury commissioners appointed on partisan consideration and from only the Democratic and Republican Parties, and without any representative of the Socialist Party; that said jury commissioners were hostile to these defendants;

(*b*) That all the names so selected and put in the jury box were the names of adherents of the Republican and Democratic Parties exclusively and that the names of members of the Socialist Party had been excluded from said box because of their political affiliation;

387 (*c*) That the names so selected and put in said jury box had been taken exclusively, or almost exclusively, from the names of land-owners, a property owners, capitalists and employers, and the names drawn from said box for these juries were the names exclusively of land-owners, property-owners, capitalists and employers, who by reason of their private interests were hostile to and prejudiced against these defendants;

(*d*) That said juries had been selected and drawn from only a part of the Northern District of Ohio, instead of the entire District;

(*e*) That the jury box had not been emptied at any time within recent years nor re-filled since November, 1916, many months before said drawings, and said box did not at the time of said drawing, contain the names of 300 qualified persons; that many of the names therein had been selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings; that three of the persons on said grand jury had been so selected by Sullivan and 3 on the petit jury.

(*f*) That the Clerk of the Court, in the presence of the Marshal, both being political adversaries of these defendants and opposed to and prejudiced against them had selected from the box the names for jury service, and said names had been selected exclusively from adherents of the Republican and Democratic Parties who were likely to be and in fact were hostile to and prejudiced against these defendants; in violation of defendants' constitutional right of due process of law and trial by an impartial jury;

388 (*g*) That said Marshal and his Deputy, who served the writs of venire for both of said juries were not "indifferent persons," but active partisans of the Democratic Party and political adversaries of these defendants;

(*h*) That said Marshal did not summon the 30 men for grand jury service as ordered by the Court and drawn by the Clerk, but selected and summoned only nineteen (19) thereof;

(*i*) That all persons summoned for said grand and petit juries were summoned by mail, including several residents of Cleveland, Ohio;

(*j*) That one D. E. Grager was sworn as a grand juror, no such

name having been drawn from the jury box, nor any one of that name summoned;

(*k*) That the Clerk in drawing the said grand jury, drew six from Cuyahoga County alone and none from seven of the Counties; and in drawing the petit jury, said Clerk, without any order of the Court, directing such selection, drew five from Cuyahoga, four from Columbiana, and three from Ashtabula, but none from eight Counties, in violation of Sec. 277 Judicial Code, and the constitutional right of defendants to an impartial jury of the State and District.

(*l*) That said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case;

(*m*) That said grand jurors were not of the necessary qualifications were not of the body of the State and District, nor properly constituted a grand jury.

34. The Trial Court erred in overruling a demurrer on
389 the ground that the facts set forth therein do not constitute an offense against the laws of the United States.

35. The Trial Court erred in overruling said demurrer on the ground that the indictment charges these defendants with being accessories to a misdemeanor;

36. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege the events or acts as occurring prior to the finding of the indictment.

37. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege that it was presented by a grand jury, "duly impaneled and sworn," and in, of and for the District.

38. The Trial Court erred in overruling the demurrer on the ground that the Act of May 18th, 1917, *nor after* the Draft Act, and the Proclamation of said date, *their* unconstitutional*ity* on the following grounds:

(*a*) Said Act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;

(*b*) Said Act deprives men of their liberty without due process of law in violation of Amendment V of the United States Constitution;

(*c*) Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;

(*d*) Said Act violates Article I Section 8 Clause 15 of the United States Constitution;

(*e*) Said Act violates Article 1, Section 8, Clause 16 of the United States Constitution;

(*f*) Said Act in Section IV thereof, violates Article 3, Section 1 and Article 1, Section 8, Clause 9, of the United States Constitution.

(*g*) Said Act violates Article II, Section 2 of the United States Constitution;

390 (*h*) Said Act violates Article 10 of the amendments of the United States Constitution;

(*i*) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in the Preamble of the United States Constitution.

39. The Trial Court erred in refusing to grand to these defendants separate trials, because under the circumstances it was impossible to introduce evidence as to one of the defendants without thereby prejudicing all as members of said political organization, which refusal of the Court, is evident from the following testimony:

The Court: The motion for separate trials will be denied and you may have your exceptions.

Mr. Sharts: Enter the exception of the defendants.

40. The Trial Court erred in refusing a challenge for cause by defendants of a juror, Charles P. Smith, as is evident from the following testimony:

Mr. Sharts: Then let me put my question in this form: suppose it should develop that these men have made a very ardent and vehement attack upon the law, criticising the law and criticising the President and the Government in their public meetings, but have advised their hearers to register in spite of the evil features of the law, as they see it, but it should develop that a young man listening to them has been induced thereby to refuse to register, would that affect your view as to the probable guilt or innocence, that circumstance, that they were urging their protest against the Draft Act?

Mr. Breitenstein: I object to the form of the question.

The Court: I will let him answer that question.

A. I think it would influence me against them.

Mr. Sharts: I would like to challenge the juror for cause, if Your Honor please.

391 The Court: I will get a little further information. Mr. Smith, have you formed in your own mind any opinion as to the guilt or innocence of the parties defendant in this case.

The Juror: No, sir.

The Court: Have you any personal familiarity, by hearsay or otherwise, with the alleged offense charged against them and the circumstances under which it was committed?

The Juror: Not much of one. I read some in the paper at the time this took place, something of that.

The Court: Do you remember now distinctly the circumstances and details which you read?

The Juror: No, sir.

The Court: Are you conscious of any bias or prejudice against these defendants or either of them which would influence or control your judgment and opinion as to their guilt or innocence according to the evidence as it may be produced before you and the law as it may be given to you by the Court?

The Juror; No, sir.

The Court: I repeat to you again: Can you, in your opinion, serve upon this jury and render a verdict of guilty or not guilty according to the evidence as it may be presented and the law as I shall give it to you?

The Juror: Yes, sir.

The Court: I will overrule your challenge for cause.

Mr. Sharts: Enter our exception.

11. The Trial Court erred in refusing the members of the jury to answer the following questions as is evident from the following testimony:

Mr. Sharts: Is there any man here that does not know the distinction between the Socialists and the Anarchists?

392 Mr. Wertz: I object.

The Court: That is not a proper question.

Mr. Sharts: Is there any man here that does not know there is a very wide distinction between Socialists and Anarchists?

Mr. Wertz: I object to that.

The Court: I will sustain the objection to that question. I am not going into a discussion of that question.

Mr. Sharts: Enter the exception of the defendants to the ruling of the Court.

12. The Trial Court erred in overruling defendants' challenge to the petit jury array, made after examination, on the ground that the defendants had been misled as to what jury would try the case, and that said panel had been drawn before the grand jury which brought in the indictment, as is evident from the following testimony:

Mr. Sharts: At this point, If Your Honor please, I have not had the opportunity to look the point up and I do not know whether it has any merit at all, but I would like to interpose a challenge to the entire array before proceeding further, on the ground that we were certainly misled, not intentionally, by the drawing of the petit jury by the order of the Court, following the drawing of the grand jury, in that we assumed that the petit jury which would try the case, was the petit jury drawn following the drawing of the grand jury, and we spend considerable time and money looking up the antecedents of the men to sit on the petit jury, and we are now confronted with a petit jury who are strangers to us entirely. It places us at some disadvantage and while I doubt if we have a legal right to object to that method of placing a petit jury before us, I would like to interpose a challenge on that ground.

393 The Court: The drawing was made of additional jurors for this term and the order was made in that form, and, inasmuch as the Court has allowed you wide latitude to inquire as to the qualification or disqualification of the jurymen tendered and there is not disclosed a shadow of objection as to any of the jurymen offered you, I shall overrule the challenge.

Mr. Sharts: Enter the exception of the defendants.

43. The Court erred in allowing an improper announcemen prejudicial to defendants, in the Clerk's administering the oat to the jury as appears from the following testimony:

The Court: The Clerk will swear the jury.

The Clerk: You and each of you do solemnly swear that you wil well and truly try the issue joined in this case wherein the Unite States of America by indictment prosecutes Alphons J. Schue Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Bake for violation of the Act of May 18th, 1917, and a just and tru verdict render therein according*ly* to the testimony and the law——

The Court: Just a moment. I did not understand that Mr Schue was on trial in this case.

Mr. Wertz: He plead guilty.

The Court: Then is that a proper form of oath?

The Court: All right.

The Clerk: —and a just and true verdict render there'n accord ing to the testimony and the law as it shall be given you by th Court, so help you God.

Mr. Sharts: I would like to interpose an exception to the form in which the announcement was made and the form of the oath I mean the announcement regarding Mr. Schue, in the presence of the jury.

Mr. Wertz: We can produce the record.

The Court: You may have your exception.

394 44. The Trial Court erred in admitting, as against the defendants, over their objection and exception, certain testi- mony of the witness, Alphons J. Schue, in substance as follows:

Q. When did you first learn of the conscription law or the regis- tration law?

A. I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please, the Act under which this indictment is drawn was passed on a certain date (May 18th) and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that subject to certain restrictions, but the question is not open to objection on that ground.

Q. On the 20th of May, and prior thereto, what was his intent and purpose with respect to the registration provisions of that law?

The objection would be overruled. Exception by defendant.

A. I would have certainly registered, if I had not heard about these Socialist Peace Meetings.

45. The Trial Court erred in admitting the said testimony as against defendants, Ruthenberg and Wagenknecht.

46. The Trial Court erred in admitting testimony over the objection and exception of defendants, as against the defendants, Ruthenberg and Wagenknecht, regarding the speech of Charles Baker of May 20th, as is evident from the following testimony:

395 Q. Now, do you recall what Baker said on the 20th of May, 1917, in substance, Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say that you can recall?

A. And he told about the standpoint of the Socialist Party, the way they voted against conscription and that it was taken by the Local here that all Socialists would refuse to register.

Q. What is the last part of the answer?

A. That all Socialists would refuse to register and induce others, telling them that they would have the support of the Socialist Party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory, I will ask you if you recall if he said anything about himself registering peronally?

Mr. Sharts: I object to putting a suggestion like that in a question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance what you remember as to Mr. Baker's speech on the 20th of May, at the Public Square. Is that correct?

The Witness: Yes, sir.

The Court: You may put the question, Mr. Wertz.

Exception by defendant-.

The Witness: He said he would refuse to register, he being of military age.

Q. Do you know whether or not, he did, in fact, register?

396 Mr. Sharts: I object.

The Court: The objection to that will be sustained.

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney anything in addition to what has already been said what Mr. Baker said on the subject with reference to being shot before registering.

Exception by defendant-.

A. He said he would rather be shot here as a man than in the trenches of Europe as a dog.

47. The Trial Court erred in admitting evidence of the speeches of Wagenknecht and Ruthenberg on May 27th as against Baker, and in overruling the motion for a new trial based on that point.

48. The Trial Court erred in refusing the request of defendants, that the testimony of James L. Lind, as follows, be stricken out:

(By Mr. Sharts:)

Q. This statement that you refer to, was it at the police station?
A. Yes, in the Police Inspector's Office.
Q. Was Mr. Schue present?
A. I don't think so. I don't know Mr. Schue.

Mr. Sharts: If Your Honor please, I am going to ask to have the testimony of this witness, with regard to any admissions made by Mr. Wagenknecht, at the police station, stricken out, as not having been made in the presence of Mr. Schue.

397 The Court: I will overrule your request and you may have your exception, but I will make this statement in addition to that.

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony made by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

49. The Trial Court erred in admitting the introduction of evidence by Wilbur D. Bacon, and permitting the introduction of a leaflet purporting to have been approved at a meeting attended by the said Wilbur D. Bacon, on May 13th, 1917, and at which meeting defendants, Ruthenberg and Wagenknecht were present, on the ground that the said leaflet was alleged to have been approved by some of defendants on May 13th or five days prior to the passage of the Act, as appears from the following testimony:

(By Mr. Wertz:)

Q. Were you present at a meeting some time in May at which Ruthenberg and Wagenknecht were present?
A. Yes, sir.
Q. Do you recall the time of that meeting, the date?
A. It was on or about the 13th day of May.

Mr. Sharts: I object to any further examination on that line.

The Court: What have you to say?

Mr. Wertz: I want to inquire about this resolution. (Handing paper to the Court.)

The Court: Have you seen it?

Mr. Sharts: No.

The Court: Mr. District Attorney, before I rule on it, I think Counsel should see it.

398 Mr. Wertz: Yes.

The Court: The resolution at the bottom is what he is inquiring about.

Mr. Sharts: I will interpose my objection to the introduction of any such leaflet unless it be first established that it was used after the enactment of the law.

The Court: I will say to the jury, and I will say to them now, that no conviction of these defendants or either one of them can be predicated upon any act which was done and performed by them prior to the 18th of May, 1917, but it is in evidence here from one of the witnesses who has testified that after the 18th day of May, 1917, some one or the other of these speakers referred to the action taken by the local organization of the party that they were undertaking to represent and proclaimed in a way *that* that action had been, and you will recall the other testimony, which seems to me makes this evidence competent, if for no other reason than as bearing upon the motive and intent and as characterizing the conduct and attitude of these three defendants on the 20th and 27th of May. I am not undertaking to say what would be. The competency of this witness to testify with respect to any resolution or any action taken or that would bind either of these defendants as participants in the adoption of it or assent thereto has not been disclosed. But this statement will indicate in a general way what my ruling will be as questions arise, so that you may take your exceptions now or interpose them from time to time.

Mr. Sharts: I will take our exception now to the ruling of the Court, and, if Your Honor please, I would like to call your attention further, for the protection of the defendants in this matter, to the fact that we are, I believe, limited strictly to what was brought

399 to the attention of Mr. Schue. Any activities by the association, either before or after May 18th, if those activities were not brought to the attention of Mr. Schue, cannot be introduced in this case.

The Court: I concur entirely in that position. I shall rule and charge in accordance with it, but the testimony here as to what was said and done by these defendants on the 20th and 27th of May in the presence of Mr. Schue makes competent, if it should appear that these defendants were participants in the adoption of any resolution of this character, the evidence of the fact as characterizing their motive and intent and as bearing upon the primary charge here as to whether they aided and counseled Schue wilfully and as to the intent with which their acts were done and performed which have been testified to. That will be the line of ruling. You may have your exception.

Mr. Sharts: I will take my exception to that and ask Your Honor whether it is necessary to raise the question now as to the form of this resolution in the leaflet as it is offered here?

The Court: We will see about that when we get to it. He has not proved any resolution was adopted and he has not proved the con-

tents of it nor that these defendants were involved in it. I will rule on your objections as we progress.

Q. Do you recall who presided over the meeting?
A. Mr. C. E. Ruthenberg presided.
Q. Is that the gentleman sitting at the table here? (Indicating defendant Ruthenberg.)
A. It is.

Mr. Sharts: Enter an exception.
The Court: The objection will be overruled.

Q. Did you see Mr. Wagenknecht at that meeting?
A. Yes, sir.

400 Mr. Sharts: Enter our objection, and I will ask the witness to wait always until I enter the exception.
The Court: Mr. Stenographer, you will note an objection and exception to each one of these questions and answers, even though Mr. Sharts does not specially mention it and I do not specially rule.

Q. Do you recall whether or not Mr. Baker was present?

(Objection by defendant; overruled; exception.)

A. I do not recall if he was present or not. I did not see him.
Q. Do you recall the presentation at that meeting of a resolution in regard to the registration under the Conscription Act?

(Objection by defendant; overruled; exception.)

Q. I hand you a paper marked "Government's Exhibit No. 1" and ask you to examine it and see if you recognize what that is?

(Objection by defendant; overruled; exception.)

A. That is the resolution passed at the meeting at the Socialist Hall.

Mr. Wertz: I do not know whether the Court and jury heard the answer or not.
Mr. Sharts: I object to the presenting of that clipping. There has been no connection shown between Mr. Schue and any meeting at that time, of the reading of that resolution to Mr. Schue or any definite explanation of that resolution to Mr. Schue.
The Court: I think it would perhaps be prejudicial to your clients if I were to summarize the testimony, as I recall it, of Mr. Schue as to what was said by these defendants in the meetings on the 20th and 27th of May. For the purpose of bearing upon the in-
401 tent with which the acts were said and done which have been testified to by Mr. Schue as having taken place in the presence and in his hearing, I will admit the copy of the resolution referred to. I will say this much, that Mr. Schue distinctly testified that it was stated by these speakers as to what had been the attitude of the National Socialist Party in their convention at St. Louis. It was further testified by Mr. Schue that it was stated by these speak-

ers that the local organization of the Socialist Party of which they claimed to be representatives had taken some action, but without going further you will remember the rest of the testimony bearing upon that subject. Under the circumstances, as characterizing and bearing upon the intent which it is necessary here for the government to prove, I regard the resolution as competent evidence.

Mr. Sharts: Before he introduces it I want to call Your Honor's attention further to an omission. How has he identified the resolution referred to in any particular speech that Mr. Schue heard with this particular resolution. If your Honor please, I ask that they introduce first the resolution of the National Socialist Party that they say the speakers on May 20th in the hearing of Mr. Schue referred to and said that the Socialist Party of Cleveland had taken similar action with regard thereto. There is no evidence before the Court at present that this is the resolution in accordance with the resolution of the National Convention of the Socialist Party.

The Court: I will overrule your objection.

Mr. Sharts: Enter our exception.

50. The Trial Court erred in not permitting Counsel to show how many more resolutions were passed at a certain meeting, at which some of defendants were present, as *it* is evident from the following testimony:

402 (By Mr. Sharts:)

Q. Will the Court permit me to question the witness on a few points?

The Court: That you think goes to the competency of the testimony now offered?

Mr. Sharts: Simply as to his knowledge of how many resolutions were passed and with reference to what.

The Court: That does not go to the competency of the testimony now offered. It might go to his credibility or to his memory or to other matters which are collateral but not to the competency of what is being offered. No, not for that purpose.

Mr. Sharts: Enter our exceptions.

51. The Trial Court erred in permitting testimony of Farasey, of statements made by Wagenknecht in the absence of Schue, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. I will hand you a transcript here and ask you whether you made that transcript from the original notes and whether or not it is a correct transcript?

A. Yes, all of that and I read that over.

Q. I will ask you to read the conversation that took place between Wagenknecht, Mr. DeWoody and yourself and Mr. Lind at the police station, following his arrest?

Mr. Sharts: If Your Honor please, I want to enter my objection at this time. Mr. Schue is charged as the principal who refused to

register, and the statements that have been made here by the reading of those notes are the only statements that were made or that could possibly have been made in the hearing of Mr. Schue. Any further statements cannot be added on top of and in addition to what has been presented as a complete record of the statements made by Mr. Wagenknecht.

403 The Court: You do not object to the use of the transcript because he has not produced the notes here from which he says he has transcribed it?

Mr. Sharts: I understood that he was reading from his original notes at the first.

The Court: He did at the first. Now, on the conversation at the jail, he says that he does not have his original notes here but he has the transcript of them which he himself made and says it is a correct transcript. If you insist that he shall send for his original notes and have them here for your examination, if you wish to examine them before he reads the transcript or reads from it, I would rule you are entitled to that.

52. The Trial Court erred in permitting the witness Farasey to testify as to part of his notes to the prejudice of defendants as is evident from the following testimony:—

The Court: What has become of that part of your notes?

The Witness: I cannot tell you.

The Court: Have you searched in every place where they probably would be?

The Witness: Hastily, yes.

The Court: Have you any reason to believe that a further search would produce them?

The Witness: No, I have not.

The Court: Did you make a transcript of them before you lost or destroyed part of your notes?

The Witness: Yes, sir.

The Court: Were those notes correctly taken at the time?

The Witness: Yes, sir, to the best of my ability.

The Court: What as to the transcript that was made from that part of your notes which are missing, was that correctly made?

404 The Witness: That was correctly made.

The Court: Have you seen the transcript?

The Witness: Yes, sir.

The Court: How long after the incident was it that you made the transcript?

The Witness: I just had time to have supper, about an hour or an hour and a half.

The Court: With that preliminary examination, I will rule that he may use part of his notes that he has here and the transcript made under those circumstances for the part of it as to which he cannot produce his notes.

Mr. Sharts: Enter our exception.

53. The Trial Court erred in admitting all of the testimony of the stenographer to the prejudice of the defendants, as is evident from the following testimony:

The Court: Have you anything more, Mr. District Attorney, so far as you would now know?

Mr. Wertz: We rest.

The Court: If you have anything more, we will receive it at nine o'clock tomorrow morning. The general denial tendered by the District Attorney this afternoon, I will permit to be filed in accordance with the leave that was asked and given yesterday, Mr. Sharts. I have had the stenographer transcribe what occurred. You may have an exception.

Mr. Sharts: Our exceptions are in. * * *

54. The Trial Court erred in refusing to direct a verdict for the defendants or any one of them or two of them at the close of the Plaintiff's testimony, there having been no corroborative evidence offered to support the statements of defendant Schue, who was an alleged accomplice.

55. The Trial Court erred in declining the attempt of defendants to produce the constitution and by laws of the Socialist Party, to show the limitation of rights and acts of defendants, as
405 officers and members of the Socialist Party, as is shown by the following testimony:—

(By Mr. Sharts:)

Q. You have spoken about a constitution and by-laws?

A. Yes, sir.

Q. I will ask you if that is the constitution and by-laws that you referred to? (Handing pamphlet to the witness.)

A. That is.

Q. Is the pledge in there the pledge that is taken by the members of the Socialist organization?

A. Yes.

Q. I wish you would read that pledge to the jury.

Mr. Wertz: If the Court please, I object.

The Court: Do you want to examine it before it is ruled on? (Pamphlet handed to Mr. Wertz.)

Mr. Wertz: I object.

The Court: I sustain the objection to it on the ground of immateriality and irrelevancy.

Mr. Sharts: Enter our exception.

55. The Trial Court erred in refusing to permit these defendants to rebut evidence of intent by producing evidence that they had constantly advised registration when inquired of, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. You are within the registration age? Have you registered?

A. (Mr. John Fromholtz.) Yes, sir.
Q. I will ask you whether or not you consulted Mr. Ruthenberg regarding registration?
A. No.

Mr. Wertz: I object.

Q. What did you say "No"?
A. I have not asked Mr. Ruthenberg about registration.

406 The Court: I regard that as incompetent testimony but I will overrule the objection for the present as he says he did not consult him.

And as is evident from the following testimony:—

(By Mr. Sharts:)

Q. Have you been asked by any one what they should do in case of registration.

A. (By Charles Baker.) I have.
Q. By whom?
A. I was asked by three persons, members of the party from Lorain, Ohio, who came to Cleveland on Decoration Day and asked my advice, as the state organizer, what they shall do on the question of registration.

Mr. Wertz: I object.
Mr. Sharts: If Your Honor please, it seems to me that the testimony is admissible at least to show the motive and purpose and consistency of the speech that he has made, to show the attitude of the speaker with regard to registration, which has been questioned.
The Court: No, I will sustain the objection to that. The charge here is a specific charge that is confined to his acts and conduct on a specific occasion when he was listened to by some person and when it is alleged he caused that person to violate the law and thereby to make the defendant here a participant in it. That fact cannot be affected by proof as to what his attitude was on other and different occasions. I will sustain the objection.
Mr. Sharts: Enter the exception of the defendant.

56. The Trial Court erred in permitting the prosecution to ask Ruthenberg and in insisting that Ruthenberg answer, the questions of explanations to show, viz., how the young *man* of the Country could be conscripted without first registering, when the wit-
407 ness did not urge conscription, as is evident from the following testimony:—

Q. Will you explain to the jury how in your mind it was *probable* to conscript the Socialist or the young *man* of the country without first registering, under this law?

Mr. Sharts: I object.
The Court: I think that is legitimate.

Mr. Sharts: If your Honor please, the point is this: He is asking him to explain how they could conscript them without registering. He has not urged their conscription.

The Court: I will overrule your objection, and on this ground: The witness has undertaken, every time that the word "registration" has appeared in any of the transcript of what he said upon that occasion, to say that he did not use the word "registration," but it was "conscription," undertaking to draw in his mind some distinction between opposing registration for conscription and upholding conscription. Now, as bearing upon his intent, and what he meant by his acts and words, I consider the District Attorney's question competent.

Mr. Sharts: Enter the exception of the defendants.

The Witness (Mr. Ruthenberg): I would gladly state, in reply to the question, that this difference existed in my mind: A man might submit to registration, he might voluntarily go and register his name as a man between the ages, go through that formality, which this Court itself, I believe, has said in its charge to the Grand Jury was a mere formality preceding the act——

The Court: No, I did not say anything like that.

The Witness: That is as I remember it. And he might submit to that and later, if he happened to be one of — victims who
408 was selected to go and shoot his fellow human beings, he might well, as tens of thousands of men in England have done, refuse/ to be conscripted and to murder his fellow human beings. That is my position.

57. The Trial Court erred in not directing a verdict for the defendants at the close of all the testimony, for the same reason.

58. The Trial Court erred in overruling the motion of the defendants for a new trial for the reasons therein given, and particularly on the ground of newly discovered evidence, tending to show that Schue perjured himself on the witness stand in saying that he had had no connection with the Socialist organization other than to attend the meetings of May 20th and May 27th.

59. The Trial Court erred in overruling the motion in arrest of judgment for the reasons therein given, wherefore the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, each for himself and jointly, pray that the judgment and sentence herein may be reversed and held for naught.

CHARLES E. RUTHENBERG,
ALFRED WAGENKNECHT,
CHARLES BAKER,
By MORRIS H. WOLF,
JOS. W. SHARTS,
Attorneys for Defendants.

409 *Order of Severance.*

(Ent. July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

This matter coming before the Court on the application of Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, parties defendant, for a Writ of Error; and Alphons J. Schue, party defendant, being present in person and by counsel, and the said Alphons J. Schue, having declined to join in said application or prosecute error, it is hereby considered by the court that an Order of Severance be allowed, and the same is hereby allowed, granting to the said Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker the right to prosecute said proceedings in error independently of the said Alphons J. Schue.

410 *Order Allowing Writ of Error.*

(Ent. July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

This 25th day of July, 1917, came Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, by their attorneys, and each for himself and jointly, filed and presented to this court their petition, praying for an allowance of a writ of error and assignment of errors to be urged by them; praying also that a transcript of the record, proceedings, papers and exhibits upon which the judgment and sentence herein were rendered, duly authenticated, be sent to the Supreme Court of the United States, and that such other and further proceedings may be had, as may be proper in the premises.

On consideration whereof the court does allow the Writ of Error, and orders that said Writ of Error shall operate as a supersedeas, and that said court has fixed a supersedeas and bail bond on behalf of each of said defendants in the sum of $5,000.00 *Dollars*, the said bond to be approved by the clerk.

411 *Writ of Error.*

The Supreme Court of the United States of America.

U. S. District Court for the Northern District of Ohio, Eastern Division.

No. 3873.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The United States of America as plaintiff and Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, said case being No. 3873 on the Docket of the U. S. District Court for the Northern District of Ohio, Eastern Division, a manifest error hath happened, to the great damage of the said Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and each of them, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgement be therein given, that then and under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington in the District of Columbia on the — day of —— next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

412 Witness the Honorable Edward D. White, Chief Justice of the United States the 25" day of July, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.

Allowed by
D. C. WESTHAVER, *Judge.*

July 25, 1917.

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*Not exceeding — days from the day of signing the citation.

413 [Endorsed:] In the District Court of the United States for the Northern District of Ohio, Eastern Division. No. 3873.

The United States of America, Plaintiff, vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, Defendants.

Writ of Error. Filed Jul. 25, 1917, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

Morris H. Wolf, Cleveland, O., Joseph W. Sharts, Dayton, O., Attorneys for Defendants.

Return on Writ of Error.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court, a full, true and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the precipe filed, to the Supreme Court of the United States.

There is annexed hereto and made part of this return the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said District, this 21st day of August, A. D. 1917, and in the 142nd year of the independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk.*
By F. J. DENZLER,
Deputy Clerk.

Filed Aug. 21, 1917, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

414 *Citation.*

U. S. District Court for the Northern District of Ohio, Eastern Division.

No. 3873.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at

the City of Washington, in the District of Columbia, on the *20 day of August, next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiffs in error, and each of them, as in said petition for a Writ of Error mentioned and said Assignment of Error filed with said petition for a Writ of Error, should not be corrected, and why speedy justice for the parties in that behalf should not be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 25" day of July, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America, the one hundred and forty-first.

D. C. WESTENHAVER,
Judge of the District Court.

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*Not exceeding — days from day of signing.

Service of the above citation is hereby acknowledged and the appearance of the United States of America is hereby entered.

———,
U. S. Attorney.

115 [Endorsed:] U. S. Marshal's No. —. In the District Court of the United States for the Northern District of Ohio, Eastern Division. No. 3873.

The United States of America, Plaintiff, vs. Charles E. Ruthenberg, Alphons J. Schue, Alfred Wagenknecht, and Charles Baker, Defendants.

Citation. Filed Jul. 27, 1917 at — o'clock — M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

Morris H. Wolf, Cleveland, O., Joseph W. Sharts, Dayton, O., Attorneys for Defendants.

U. S. Marshal's Return.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Cleveland, O., July 27, 1917, and on the same day at the same place, I served it on the within named The United States of America, by delivering to Jos. C. Breitenstein, Asst. U. S. Atty. for the said The United States of America, and for the Northern District of Ohio, at Cleveland, O., personally, a true and certified copy hereof, with all endorsements thereon.

CHAS. W. LAPP,
U. S. Marshal,
By T. E. WALSH, *Deputy.*

Marshal's Fees.

Service Spa. ..... $2.
Travel *Spa.* .....

$2.

416 *Application for Withdrawal of Exhibits.*

(Filed August 20, 1917.)

In the District Court of the United States for the Northern Distri
of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARL
BAKER, Defendant-.

Application for Withdrawal of Exhibits.

Now come defendants in the above entitled action, by their a
torneys, and respectfully ask the Court that they be permitted
withdraw the exhibits offered by the Government in the above actio
and which exhibits are now attached to the bill of exceptions, for t
reason that the said exhibits must be attached to a record certified
the Supreme Court of the United States.

MORRIS H. WOLF.
JOS. W. SHARTS.
Attorneys for Defendants.

417 *Order for the Withdrawing of Exhibits.*

(Entered August 20, 1917.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARL
BAKER.

On application of defendants for permission to withdraw exhibi
for the purpose of attaching them to a record to be certified to t
Supreme Court of the United States, it is hereby ordered by t
Court that all of said exhibits offered and introduced on behalf

the plaintiff, and defendants, be withdrawn from the files of this Court, and forwarded to the Clerk of the Supreme Court of the United States, for use at the hearing of this cause in the said Supreme Court of the United States.

418 *Precipe for Transcript.*

(Filed August 4, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

Precipe for Transcript.

To the Honorable Clerk:

Please prepare transcript of record in the above entitled cause, and include therein the following papers:

Indictment.
Challenge to the Array.
Motion to Quash.
Plea in abatement.
Demurrer.
Answer of United States to Challenge to Array.
Order overruling challenge to the array, motion to quash, plea in abatement and demurrer.
Amended challenge to the array.
Orders on trial, verdict, etc.
Motion for a new trial.
Motion in arrest of judgment.
Order overruling motion for a new trial, and motion in arrest of judgment.
Order approving narrative form of testimony.
Narrative form of testimony.
Petition for writ of error.
Assignment of errors.
Amended assignment of errors.
Order allowing writ of error.
Writ of error.
Citation.
Order of Severance.
Motion and Order withdrawing exhibits.
This Precipe.

Please deliver all papers to the Clerk of the Supreme Court of the United States, at Washington, D. C.

Serve copy of Precipe on Attorneys for Government by Marshal.

CHARLES E. RUTHENBERG,
ALFRED WAGENKNECHT,
CHARLES BAKER,
By MORRIS H. WOLF,
JOS. W. SHARTS,
Attorneys for Defendant-.

419 (Endorsement.)

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

U. S. Marshal's Return.

Received this writ at Cleveland, O. August 4th, 1917, and on the same day and at the same place I served the within attorneys for the Government, by delivering to Joe. C. Breitenstein as the Asst. U. S. District Attorney for the said Government for the Northern District of Ohio, at Cleveland, O., personally a true and certified copy hereof with all endorsements thereon.

Marshal's Fees	$2.00
Travel	.06
	$2.06

CHAS. W. LAPP,
U. S. Marshal.

420 *Certificate of Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the final record, including the bill of exceptions in narrative form, petition for writ of error, assignments of error and bond on writ of error, and all proceedings in said cause in accordance with the precipe for transcript filed by plaintiff in error, the originals of all which except certain exhibits withdrawn by leave of court are now in my custody as clerk of said court.

There is also annexed to and transmitted with such transcript of record, the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland in said district this — day of

August, A. D. 1917, and in the 142nd year of the independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk.*
By F. J. DENZLER,
Deputy Clerk.

Endorsed on cover: File No. 26,123. N. Ohio D. C. U. S. Term No. 656. Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, plaintiffs in error, vs. the United States of America. Filed August 30th, 1917. File No. 26,123.

FILE COPY.

Office Supreme Court, U. S.
FILED
OCT 2 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

MEMORANDUM BY PLAINTIFFS IN ERROR OF OBJECTIONS TO MOTION BY THE UNITED STATES TO ADVANCE.

JOSEPH W. SHARTS,
Of Counsel for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

MEMORANDUM BY PLAINTIFFS IN ERROR OF OBJECTIONS TO MOTION BY THE UNITED STATES TO ADVANCE.

The plaintiffs in error interpose their objection to the motion filed to advance the cause and to have it heard jointly with others known as the "Selective Draft Law" cases, for the reasons following:

1. This cause was decided in the trial court at the end of July and docketed on August 30, 1917. Copies of the printed record were not placed in

the hands of counsel until less than two weeks ago. Counsel have had no opportunity to prepare such a brief as the cause requires.

2. Fifty-nine points of error were assigned, and counsel earnestly believe that a large number of these should be carefully and thoroughly presented. Among these points of error are: Whether members of a particular political party may be excluded from jury service; whether a jury exclusively of political adversaries of these plaintiffs in error is an impartial jury; whether men of financial interests adverse to the activities of these plaintiffs in error which are involved in the offense charged are an impartial jury; whether a jury of certain counties to the exclusion of other counties is a proper jury of the State and District; whether an indictment may properly be returned by a grand jury without a sworn charge laid before it or any witness sworn and sent before it in the particular matter; whether men may properly be indicted as accessories to a misdemeanor; and many other questions as to due process of law, the proper admission of testimony, etc.

3. The constitutionality of the Draft Act is but one of several constitutional questions raised, and is not mainly relied on. The case, therefore, is different from the others, and we ask a separate hearing for it.

4. Counsel will be unable properly to prepare a brief covering comprehensively all the points relied on in less than three months, and if plaintiffs in error are forced to a hearing with the haste urged by the Department of Justice, it will be equivalent to an *ex parte* proceeding.

5. The case in the trial court was prepared almost entirely by Mr. Morris H. Wolf, of the Ohio bar, who, by the rules of this court, cannot be admitted to practice herein until December 16, 1917, and his personal participation in the hearing of this cause is regarded as most important.

Respectfully submitted,

JOSEPH W. SHARTS,
Of Counsel for Plaintiffs in Error.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 406.

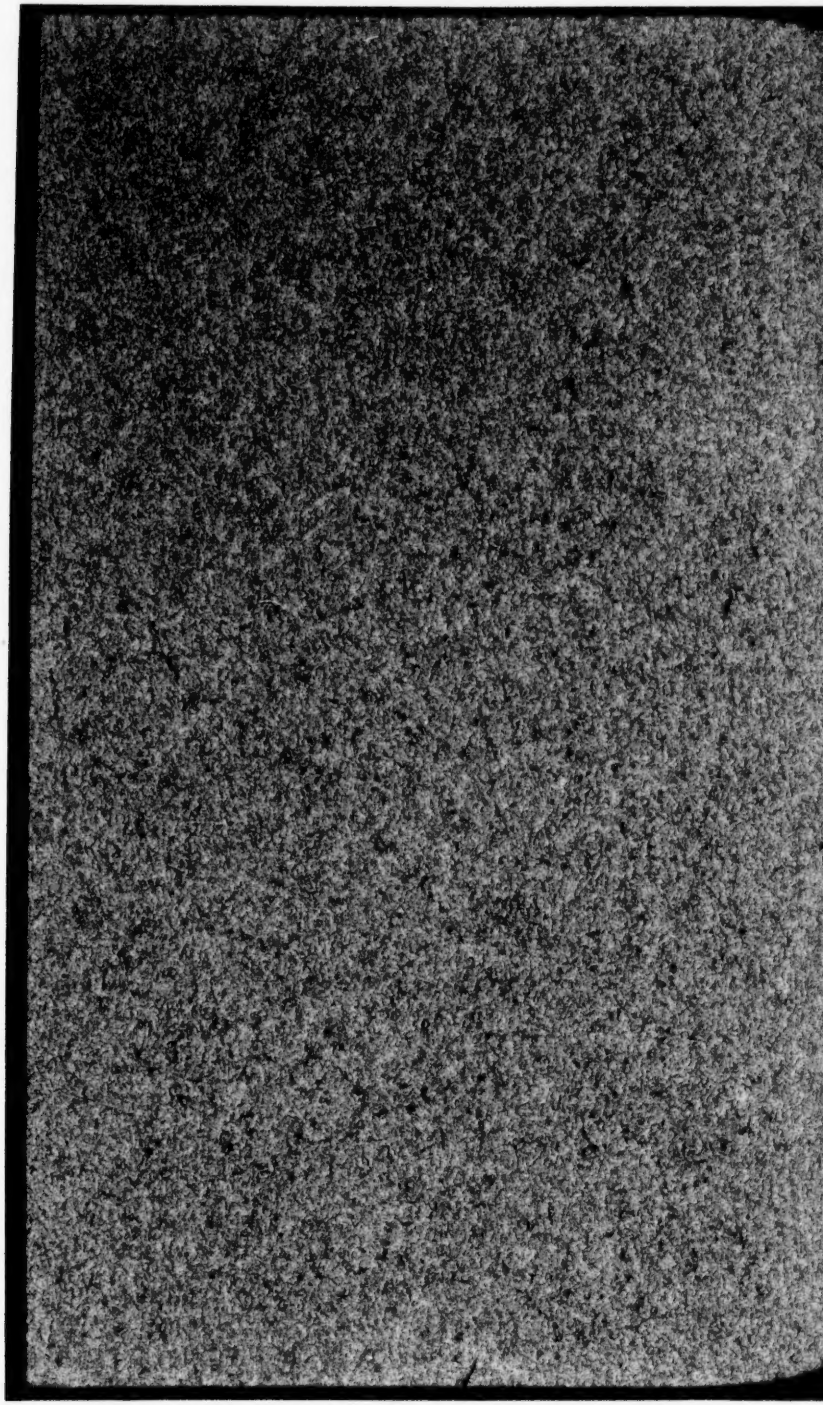
CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

JOSEPH M. SHARIT,
MORRIS H. WOLF,
Attorneys for Plaintiffs in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This matter comes up on writ of error to the District Court for the Northern District of Ohio, Eastern Division.

The grand jury for the April term, 1917, found an indictment against the plaintiffs in error, in the same count with one Alphons J. Schue, who was charged with failing to register on June 5th, 1917, as required by the Selective Service Act and the President's proclamation thereunder. The plaintiffs in error were charged with aiding, abetting, counseling, commanding, inducing, and procuring Schue, "before and at" said date, not to register.

The plaintiffs in error filed a verified challenge to the grand and petit jury arrays, alleging, among other grounds, that (1) they were officers of the Socialist party, and the acts charged must have been done, if at all, in pursuance of their duties as such officers; the Socialist party was without representation on and excluded from representation on the jury commission, which was composed exclusively of their political opponents; the jury lists had been made up exclusively of Republicans and Democrats, who were their political opponents, and Socialists excluded; the grand and petit jury venires had been made up exclusively of their political opponents, who by reason of political hostility were prejudiced and not impartial; (2) they had, in pursuance of their duties as said Socialist officials, advocated the abolishment of rent, interest, and profit, and these political activities were directly involved in the case, while the jury lists and venires had been made up exclusively of men who derived their income from rent, interest, and profit, and were therefore hostile and prejudiced by reason of private interest; (3) the jurors were drawn exclusively from the Eastern Division of the District, and from only part of the counties within the division, contrary to the Sixth Amendment of the Constitution. The court heard the challenge on evidence, but ruled out as immaterial all testimony tending to show the political complexion of the juries and jury commissioners, to which rulings the plaintiffs in error excepted. The testimony of the clerk, Mr. Miller, was that he had not selected names for jury service himself, but had obtained lists from common pleas judges, and that all the names were of persons within the division; also that not all counties within the division had been drawn from. The court overruled the challenge, the defendants excepting.

The plaintiffs in error then filed their motion to quash, alleging, among other grounds, that (1) the grand jury had presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been pre-

sented to the grand jury or any witnesses sworn in a particular matter; (2) the indictment failed to state that Schue was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen at the time of the alleged offense; (3) the indictment failed to state the proclamation had been published at the time of the alleged offense, or was ever published; (4) it alleged three separate offenses in one count; (5) it failed to set forth any act or manner in which the plaintiffs in error did aid, abet, counsel, command, induce, and procure said Schue to commit the alleged offense, and failed to set forth the nature and cause of the accusation and apprise them of what they would be required to meet; (6) it charged the plaintiffs in error as accessories to a misdemeanor. The court overruled the motion, the plaintiffs in error excepting.

The plaintiffs in error offered to file their plea in abatement, repeating the allegation that the grand jury had brought in the indictment without evidence, but the court refused leave to file it, to which ruling they excepted.

Thereafter the plaintiffs in error filed their demurrer to the indictment, alleging, among other grounds, that (1) the facts set forth do not constitute an offense against the laws of the United States; (2) the Selective Service Act and proclamation thereunder are unconstitutional.

The court overruled the demurrer, the defendants excepting.

On the examination of the persons drawn for the petit jury, counsel for the plaintiffs in error attempted to examine them on their *voir dire*, for purposes of challenge, to ascertain if they distinguished between Socialists and anarchists, which line of examination the court refused to allow, the plaintiffs in error excepting.

The jury brought in a verdict of guilty; whereupon the plaintiffs in error filed their motion for a new trial and motion in arrest of judgment, reiterating among other grounds the points of error herein described. The court overruled the motions, to which the plaintiffs in error entered their

exceptions. And thereupon the plaintiffs in error sued out their writ of error herein.

Specification of Errors.

I. The trial court erred at the hearing of the challenge in refusing to admit testimony to show that the clerk of court was an adherent of the Republican party, the other jury commissioners were members of the Democratic party, and that the Socialist party, of which defendants were officers and members, was a minor political party within the district and was without representation on the jury board, contrary to defendants' constitutional right, as shown by the following (printed Record, pages 30 and 189):

> "Q. Can you give the names of the principal political parties in the district?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained.
>
> "Mr. Sharts: Exception.
>
> "Q. What is your political affiliation?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained.
>
> "Mr. Sharts: Enter an exception.
>
> "Q. Will you state, Mr. Miller, what were the political affiliations of Mr. May?
>
> "Mr. Wertz: I object.
>
> "The Court: The objection will be sustained unless you make your question in the form I indicated a moment ago.
>
> "Mr. Sharts: Exception.
>
> "Q. State whether or not Mr. May was a member of the principal political party in the district opposing that to which you yourself belonged.
>
> "A. He is.
>
> "Q. State whether or not he was a member of the same political party with Mr. Sullivan.

"Mr. Wertz: I object.

"The Court: The objection will be sus'ained.

"Mr. Sharts: Enter an exception, for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic party and that Mr. Miller is a member of the Republican party, and that the Socialist party is without representation on the jury board."

II. The trial court erred at the hearing of the challenge in refusing to admit the testimony of the clerk of the Cuyahoga County board of elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties, contrary to defendants' constitutional rights and section 276, Judicial Code, as shown by the following (printed Record, pages 185 and 38):

"Mr. Sharts: Now, if your honor please, I would like to call your attention, before I dismiss this witness (clerk of court), to the fact that we have here the clerk of the board of elections with a card index, and we expect to place him on the stand and we want to establish by a comparison between the card index of the clerk and the card index of the clerk of elections, that all of the names that went into the jury box at the time of these drawings were the names of Republicans and Democra's and not of Socialists, and I wish, before this witness goes, to make a request for him to produce the card index for that purpose.

"The Court: I will not require the witness to produce the card index for that purpose, and I will not receive tes'imony of the clerk of the board of elections for that purpose.

"Mr. Sharts: Enter an exception to the ruling of the court on the ground that we expect to show by

the introduction of this testimony that the grounds of our second challenge are true.

"The Court: No. What you proposed to show, Mr. Sharts, was that a comparison of the card index kept by Mr. Miller of the names in the jury box with the records of the board of elections—I suppose that is for Cuyahoga County, but for any county—would show the names in the card index were Democrats or Republicans.

"Mr. Sharts: The point was simply this: We ourselves have not the list of names. It is possible we might have gone and copied all those names off his card index, but we did not do that. In order to put those names to the board of elections, first, it will be necessary for us to have the card index to do it with, and I simply asked——

"The Court: I am prepared to rule on the assumption that you asked the clerk to produce the card index showing the list of names in the jury box, and that you proposed to show those names to the clerk of the board of elections, and that you proposed to have the clerk of the board of elections check them and say that the names of those on his card index are Democrats and Republicans. Now you may have an offer of proof in that form, and I will sustain an objection to it, but where I checked you was that you were proposing to show by the witness that the allegations and statements of a certain specification were true. You stated in your specification a whole lot more than you offered to prove. I do not think you intended to put it in that way, but that is the impression you made in my mind.

"Mr. Sharts: Does your honor make it a part of the record, your ruling, so that it will not be necessary——

"The Court: Yes, I so rule that you may have an offer to prove that and an exception."

III. The trial court erred at the hearing of the challenge in refusing to admit testimony offered for the purpose of showing that the names selected and placed in the jury box and those drawn for jury service were taken exclusively from the names of landowners, property-owners, and capitalists, as shown by the following (printed Record, pages 185 and 32):

> "Q. State if you are personally aware, or if you have by investigation become aware, of the property qualifications, of the standing in the financial and commercial world, of any of the men whose names have been placed in the jury box by you.
>
> "Mr. Wertz: I object.
>
> "The Court: The objection to that will be sustained. I do not understand that the law under which we are operating disqualifies any man from being placed in the jury box or to serve on the jury because he has or has not property, and, therefore, the question is immaterial.
>
> "Mr. Sharts: Enter an exception on the ground that by this question defendants expect to establish the allegations of the third ground of challenge to the jury array.
>
> "Q. State whether or not the names placed in the jury box are the names of landowners, property owners, and capitalists?
>
> "Mr. Wertz: Objection.
>
> "The Court: The same ruling on that.
>
> "Mr. Sharts: Enter an exception on the same ground."

IV. The trial court erred in not sustaining the challenge on the fourth ground thereof, to wit, that the juries had been selected and drawn exclusively from the eastern division instead of the entire district, contrary to the Sixth

amendment, as shown by the following (printed Record, pages 186 and 32, testimony of Mr. Miller, clerk of court):

> "These jurors whose names have been selected are from the eastern division and from every county in the eastern division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out, and I cannot tell whether all the names from one county have been drawn out that have been put in and the list of names from that county has been exhausted, or whether still some are there."

V. The trial court erred in refusing to hear testimony offered to sustain the challenge on the ground that the clerk, without an order of the court directing him to select any parts of said division, in drawing the names for the grand jury did not draw any names from seven of the counties of the division, but drew six from Cuyahoga County, and in drawing the names for the petit jury drew none from eight counties within the division, but drew five from Cuyahoga, four from Columbiana, and three from Ashtabula, as shown by the following (printed Record, pages 187 and 36):

> "Q. I will ask you (clerk of court), in the drawing of the names for the grand jury, how many counties within the division are not represented by any person residing therein?
>
> "Mr. Wertz: I object.
>
> "The Court: I will sustain the objection to that, because I have a well-defined conviction that the fact that some counties were not represented in the drawing is not a valid objection.
>
> "Mr. Sharts: I would just like to call your honor's attention to the fact that the Judicial Code does not provide for drawing by lot; that is not the manner indicated by the Code. Enter an exception on the ground that defendants expect to show by the an-

swer that there were seven counties not represented by any names in that drawing.

"Q. I will repeat the same question with regard to the petit jury, for the purpose of the record. How many counties were unrepresented in the drawing for the petit jury?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the same grounds as before—that we expect to show by the answer of the clerk that there were eight counties from which no names had been drawn within the division.

"Q. I will ask the clerk to state how many names were drawn from Cuyahoga County?

"Mr. Wertz: I object.

"The Court: I will sustain the objection.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were five drawn from Cuyahoga County.

"Q. How many were drawn from Columbiana County?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the ground that we expect to show there were four drawn from Columbiana County.

"Q. How many were drawn from Ashtabula County?

"Mr. Wertz: I object.

"The Court: The same ruling.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were three drawn from Ashtabula County."

VI. The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service

had been improperly selected, as shown by the following (printed Record, pages 187 and 31):

> "Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used.
>
> "Mr. Wertz: I object.
>
> "The Court: I do not think that is a material line of inquiry, Mr. Sharts.
>
> "Mr. Sharts: Enter an exception, because we expect to show by this witness that he has made use of the files of the board of elections and has drawn therefrom names of partisans of the Republican and Democratic parties and excluded the names of adherents of the Socialist party.
>
> "The Court: In view of that tender of proof I will reverse the ruling and permit the question to be answered.
>
> "A. I obtained the names by writing to the common pleas judges of this division for various counties, and asking them to send me a list of men in their counties qualified to serve as jurors.
>
> "Q. Were the common pleas judges to whom you sent this request members of any political party?
>
> "Mr. Wertz: I object.
>
> "The Court: I sustain the objection to that question.
>
> "Mr. Sharts: Enter an exception, because we expect to show that the common pleas judges to whom this witness applied for names were all of them members of the Republican and Democratic parties and not of the Socialist party.
>
> "(Witness:) Other names that I used were those of men that I know personally, a very few, which I selected and put in, and occasionally some name will be suggested to me by some one and I place that name in a drawer, and some of those I select and

some of them I reject when I come to make up my list.

"Q. Do you know in what manner the list of names that were sent to you from the common pleas judges, as you have described, had been selected?

"A. Not in detail.

"Mr. Wertz: I object to the question. It would be hearsay.

"The Court: I sustain the objection to that question.

"Mr. Sharts: Enter an exception."

VII. The trial court erred in overruling the motion to quash the indictment, particularly on the following grounds: (1) The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case; (2) it fails to state that Schue was a citizen of the United States or a male person not an alien enemy, who had declared his intention to become a citizen, at the time said offense is alleged to have been committed; (3) it fails to state that the proclamation had been published at the time said offense is alleged to have been committed by these defendants, or was ever published; (4) it fails to negative the possible appointments provided for in subdivision third of section I of the draft act; (5) it alleges three separate offenses in one count; (6) it fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce, and procure Schue to commit the alleged offense, and fails to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet; (7) it charges these defendants as accessories.

VIII. The trial court erred in refusing leave to the plaintiffs in error to file a plea in abatement containing, among

other grounds, the following: Said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case (printed Record, pages 14, 15, and 19).

IX. The trial court erred in overruling the demurrer to the indictment, particularly on the following grounds: (1) The facts set forth therein do not constitute an offense against the laws of the United States; (2) it charges these defendants with being accessories to a misdemeanor; (3) the Selective Service Act and proclamation thereunder are unconstitutional (printed Record, pages 18 and 19).

X. The trial court erred, in the examination of the persons drawn for petit jury service, on their *voir dire*, to permit the following questions asked by the plaintiffs in error to be answered:

> "Mr. Sharts: Is there any man here that does not know the distinction between the Socialists and the anarchists?
>
> "Mr. Wertz: I object.
>
> "The Court: That is not a proper question.
>
> "Mr. Sharts: Is there any man here that does not know there is a very wide distinction between Socialists and anarchists?
>
> "Mr. Wertz: I object to that.
>
> "The Court: I will sustain the objection to that question. I am not going into a discussion of that question.
>
> "Mr. Sharts: Enter the exception of the defendants to the ruling of the court."
>
> (Printed Record, pages 197, 48.)

ARGUMENT.

I. *Indictment and Trial by Political Adversaries Exclusively.*

The trial court heard evidence on the challenge to the jury, but ruled out as irrelevant all evidence tending to show that the defendant's political adversaries exclusively were selected for the jury commission, jury lists, panels, etc.

Discrimination in selecting a jury invalidates (*Thomas vs. Texas*, 212 U. S., 278). Ordinarily, membership in an opposite political party is not ground for challenge (*Connors vs. United States*, 158 U. S., 408). But here the political controversy directly involved, the jury being required to decide as to the purpose and effect of political speeches, raised a strong presumption that jurors of an opposite political opinion would be hostile to defendants and partisans of the Government.

The defendants were entitled to "an impartial jury" (*Constitution, art. III, sec. 2, clause 3; Amendments V and VI*). This includes freedom from political hostility (*Bucks County Jurors*, 20 Pa. Co. Ct., 36).

This right descends from Magna Charta as a barrier against "the approaches of arbitrary power" (*Thompson vs. Utah*, 170 U. S., 343; Mr. Justice Field in *Charge to Grand Jury*, 2 Sawy., 667; *Ex parte Bain*, 121 U. S., 1, 10; *Lysander Spooner's "Trial by Jury"*). But the barrier is gone when the Government, by whatever means or chance, may secure a jury entirely of its partisans to try its political adversaries.

Section 276, Judicial Code, was framed evidently to guard against this danger by providing a bi-partisan jury commission. But it fails to meet the present contingency, "where both principal" political parties are supporting the Government's policies and a third party opposing.

Such section creates an inequality under the law, bestow-

ing special privilege and protection on some political organizations and partisans and excluding others. The theory of our political institutions is that "in the pursuit of happiness all avocations, all honors, all positions are alike open to every one."

Cummings vs. Missouri, 4 Wall., 277.
Ex parte Garland, 4 Wall., 333.
Butcher's Union Co. vs. Crescent City Co., 111 U. S., 746, 760; concurring opinion of Mr. Justice Bradley.
Soon Hing vs. Crowley, 113 U. S., 703.
Allgeyer vs. Louisiana, 165 U. S., 578.

The jury must be composed "of persons having the same legal status in society" as the defendant (*Strauder vs. West Virginia*, 100 U. S., 303). But when the defendants are of a political class excluded from the jury commission, they are not of the same legal status.

II. *Indictment and Trial by Jurors Adversely Interested.*

The speeches, the general meaning, intent, and effect of which the jurors were required to decide, were attacks upon "the capitalist class," viz., persons deriving an income mainly from rents, interest, and dividends, and were exhortations to the public to abolish such forms of property ownership as produce rents, interest, and dividends. The trial court rejected as immaterial evidence tending to show the jurors had been selected exclusively from persons of the class attacked.

Even the most remote pecuniary or other special interest in the outcome of a case usually bars one from jury service. Thus residents of a town which may receive the benefit of a penalty are not competent as jurors (*Alexander vs. Brockett*, Fed. Cas., No. 181; 1 Cranch C. C., 505; *State vs. Williams*, 30 Me. (17 Shep.), 484; *Hawes vs. Gustin*, 84 Mass. (2 Allen), 402). Petitioners for a new road have been held

incompetent on a question of damages between county and landowner (*Almand vs. Rockdale*, 78 Ga., 199). The smallest degree of interest is a decisive objection (*Lynch vs. Horry*, 1 Bay (So. Car.), 229). General hostility is good cause of challenge (*Brittain vs. Allen*, 13 N. C., 120).

Admitting that ownership of property is not a disqualification ordinarily, the circumstances of a particular case may create from certain forms of ownership a presumption of self-interest likely to prejudice the juror, at least to the extent of requiring the court to entertain an offer of proof.

A juror to be impartial must be "indifferent, as he stands unsworn" (*Co. Litt.*, 155 *b*. *Reynolds vs. U. S.*, 98 U. S., 145).

III. *A Jury Not of the State and District.*

The Constitution, Amendment VI, requires the jury to be "of the State and district."

The grand and petit juries were drawn exclusively from the eastern division of the district. The grand jury purported (on the indictment) to be "inquiring for that division and district." The jury commissioner resided in the western division; but the jury lists were confined to the eastern division.

If the eastern division be regarded as "the district previously ascertained by law," the jurors were selected by a commissioner not qualified under section 276, Judicial Code, because not "residing in the district."

But if "district," under the Sixth Amendment, means the entire district, it would seem a judge has no power constitutionally to limit the drawing of the jury to any part or division, although section 277, Judicial Code, purports to authorize him (*United States vs. Dixon*, 44 Fed. R., 401). A contrary position to that of Judge Hoffman in the Dixon case was taken by other district courts in *United States vs. Wan Lee*, 44 Fed. R., 707, and *United States vs. Ayres*, 46 Fed. R., 651. Counsel have found no decision by the Supreme Court on this question.

In the Ayres case Judge Shiras indicated a distinction in the Dixon case, viz., that there the jury purported to be of only the division. But if that be of value, it exists also in the present case, by the wording of the indictment.

The constitutional restriction, "which district shall have been previously ascertained by law," would seem to veto any authority in the judge to designate a part or division of the district. The framers of the Constitution evidently sought to safeguard the defendant against the exercise of any arbitrary power.

By the common law a juror of the "county" was "from every quarter of the county * * * some out of every hundred" (*Blackstone's Comm.*, Bk. III, chap. 23, pages 359-60; Bk. IV, chap. 23, page 302). The course of the common law as it existed at the time of the adoption of the amendment controls (*Thompson vs. Utah*, 170 U. S., 343). Therefore it would seem the framers of the Constitution meant by a "jury of the district" a jury from every quarter of the district.

The error complained of is, also, that even within the division several of the counties were not drawn from at all; the clerk's method of drawing produced this result, without an order of court designating any parts. Many State decisions hold that a jury drawn from only parts of a county constitutes a denial of the constitutional right.

Schaffer vs. State, 1 How. (Miss.), 238.
Zanone vs. State, 97 Tenn., 101.
People vs. Hall, 48 Mich., 482.
Hartshorne vs. Patton, 2 Dall. (Pa.), 252.
Gibbons vs. Van Alstyne, 9 N. Y. Sup. Ct., 156.
People vs. Kelly, 31 Hun. (N. Y.), 225.
Mandeville vs. Raynolds, 68 N. Y., 528.
State vs. Nash, 48 La. Ann., 194.
People vs. Coughlin, 67 Mich., 466.
Hewitt vs. Circuit Judge, 71 Mich., 291.
Babcock vs. People, 13 Colo., 515.
Wash. vs. Commonwealth, 16 Gratt. (Va.), 531.

The same reason would invalidate a jury drawn from only some counties of the division.

IV. *Jury Lists Improperly Selected.*

The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

It has been held where a jury list was prepared from names selected by others than the authorized officials, though afterwards approved by the commissioners, it is vitiated (*United States vs. Murphy*, 224 Fed. R., 554; *State vs. Austin*, 183 Mo., 478; *Louisville, N. & St. L. Ry. Co. vs. Schwab*, 127 Ky., 82). It was even held where a statute provided the judges should meet and select the list a grand jury was not properly organized where the list was prepared by a deputy clerk and submitted to the judges separately and approved by them separately (*Clare vs. State*, 30 Md., 165).

The need of guarding the selection of grand jurors was long ago recognized. Statute 11 Hen., 4, cap. ultimo, recites that inquests had been formerly returned by persons outlawed, fled to sanctuary for treason or felony, etc., and enacts: "That no indictments be made by such persons but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, *without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it is void.*" (See Sir Matthew Hale's "History of Pleas of the Crown" (1st Am. ed.), vol. II, page 155.)

The question was raised before this court in *Rodriguez vs. United States*, 198 U. S., 156, but was disposed of on the ground that no exception had been taken. Mr. Justice Harlan said, however, in the opinion, "There are authorities which give some support to the view that this requirement is of substance, and not a mere 'defect or irregularity

in matter of form only.' (Rev. Stat., sec. 1025; Hulse *vs.* State, 35 Ohio St., 421.)"

V. *Indictment without Evidence.*

The plaintiffs in error moved to quash the indictment because it had been found without a sworn charge previously filed, without the record disclosing any witness sworn and sent before the grand jury in this matter, or any action taken on the grand jury's own knowledge. The motion was overruled. They also offered a plea in abatement on this ground, which the court refused to entertain.

Jury trial should be according to the course of the common law as it existed at the time the constitutional amendment was adopted (*Thompson vs. Utah*, 170 U. S., 343). Neither Federal courts nor Federal grand juries may assume any larger powers over the liberty of any person than therein accorded.

The common law did not admit of a grand jury's finding an indictment without evidence of some sort. It might bring in a presentment, on the knowledge of one or more jurors, "signed by all the jurors" (*In re Grosbois*, 109 Cal., 445). But the presentment must be afterwards reduced to a formal indictment before any one could be required to answer to its charge.

Hale vs. Henkel, 201 U. S., 43, 60.

2 *Hawkins, Pleas of the Crown*, chap. 25, sec. 1.

Charge of Mr. Justice Field, 2 Sawy., 667; 30 Fed. Cas., #18, 255.

In the Matter of the Communication of the Grand Jury, in *Lloyd vs. Carpenter*, 3 Clark (Pa.), 188.

Commonwealth vs. Green, 126 Pa. St., 531.

In re Grosbois, 109 Cal., 445.

Jones vs. People, 100 App. Div. (N. Y.) 55; 92 N. Y. Supp., 275.

Collins vs. State, 13 Fla., 651.

Ex parte Chauvin, Charlt. (Ga.), 14.

State vs. Darnal, 1 Humph. (Tenn.), 290.
State vs. Millain, 3 Nev., 371.
State vs. Cain, 8 N. C., 352.
State vs. Cox, 8 Ark., 436.
5 *Bacon's Abridgement*, 98, tit. "Indictment."

In Lloyd *vs.* Carpenter and Commonwealth *vs.* Green, *supra*, the decisions are based on the constitutional right to be secure against unreasonable searches and seizures and against the issuing of a warrant without probable cause supported by oath or affirmation.

Constitution, Amendments IV and V.

Admitting that Federal grand juries may of their own motion call witnesses and institute prosecutions, this does not mean that they may indict without sworn statement of some sort. If the indictment is brought on their own knowledge it should so declare.

VI. *The failure of the indictment to state that Schue was a "citizen, or a male person not an alien enemy who had declared his intention to become a citizen."*

Selective Service Act, section 2:

> "Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive," etc.

Section 5, "That all male persons * * * shall be subject to registration," etc., must be so read as to harmonize with section 2. The act clearly applies to the "militia" as defined in the National Defense Act of June 3, 1916 (sec. 57). Any "regulations" by the President requiring others

than the "militia" to register are in excess of his authority, because "inconsistent with the terms of this act" (sec. 2).

> "However mutually located are the provisions of a statute, an indictment thereon, as on the common law, must aver all negatives necessary to show affirmatively an offense."
>
> I *Bishop's New Criminal Procedure* (4th ed.), sec. 637, page 375.
>
> *U. S. vs. Cook*, 17 Wal., 168.

The indictment being so framed as not to negative the possibility that Schue was either an alien enemy or an alien who had not declared his intention to become a citizen, failed to set forth an offense.

VII. *Failure of Indictment to Aver that the Proclamation had been Published.*

> "Every such person (subject to registration) shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction."
>
> Sec. 5, Selective Service Act.

There is no allegation that the President had published his proclamation before the actions of the plaintiffs in error complained of.

It is true, courts take judicial notice of proclamations, regulations, etc., in criminal pleadings (*The Greathouse Case*, 2 Abb. (U. S.), 382; *Jones vs. U. S.*, 137 U. S., 202; *Caha vs. U. S.*, 152 U. S., 211, 221). Federal courts have taken judicial notice of which regulation is referred to as violated, although the indictment does not state which (*U. S. vs. Moody*, 164 Fed. R., 269; *U. S. vs. Slater*, 123

Fed. R., 115). Or whether a Federal or a State statute is meant by the words "against the form of the statute" (*U. S. vs. Wright*, 28 Fed. Cas., No. 16,774). Or whether an indictment is correct in averring that Navassa Island, where the offense occurred, was within the jurisdiction of the United States (*Jones vs. U. S.*, 137 U. S., 202). None of these ambiguities, when cleared up, changed or added to the facts which concerned the jury.

But judicial notice cannot read into an indictment a material fact not there before. That would be to change the work of the grand jury, adding what was perhaps contrary to the grand jurors' intention.

Ex parte Bain, 121 U. S., 1.
U. S. vs. Howard, 132 Fed. R., 325, 344.

Whether the plaintiffs in error had aided, abetted, counselled, etc., *before the publication* of the proclamation or afterwards, was a fact quite material in determining whether they had committed any offense. It was for the grand jury, not the court, to supply this material allegation.

VIII. *Separate Offenses Charged in One Count.*

The indictment charges in one count that (1) Alphonse J. Schue failed to register; (2) Charles E. Ruthenberg *et al.* did "aid" him not to register; and (3) did "abet, counsel, command, and induce" Schue not to register.

Schue's offense is made a misdemeanor by section 5, Selective Service Act.

The offense of "aiding" is possibly created by section 6: "* * * and any person * * * otherwise evades or aids another to evade the requirements of this act * * * shall be guilty of a misdemeanor," etc.

The third offense is nowhere created by the act itself, but was said, at the hearing below, to be covered by section 332, Criminal Code.

It is elementary that only one offense can be charged in one count.

Bishop's New Criminal Procedure (4th ed), I, chap. 29, sec. 432.

U. S. vs. Sharp, Peters, C. C., 131.

IX. *Failure to Set Forth the Nature and Cause of the Accusation.*

Constitution, Amendment VI.

The indictment specifically states the offense of Schu, but for the others alleges only that they "well knowing said Schue to be such person subject to such registration, at Cleveland aforesaid, in said division and district, *before* and at the time of his so doing, unlawfully did aid, abet, counsel, command and induce said Schue in so unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto as aforesaid, and procure him to commit the offense involved in his so doing."

The general rule that it is sufficient in misdemeanors "to charge the offense in the words of the statute" (*U. S. vs. Mills*, 7 Pet., 142), must "be limited to cases where the words of the statute themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The crime must be charged with precision and certainty. * * * Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged (*Evans vs. U. S.*, 153 U. S., 584).

It is true this court has held "it is not necessary that the particular act by which the aiding and abetting was consummated be specifically set out" (*U. S. vs. Gooding*, 12 Wheat., 460). But it will be observed in all

cases holding as above, the nature of the act is so particularized that no reasonable doubt is left as to how the aider and abettor must have been connected with it if at all. Thus in *U. S. vs. Gooding, supra*, the defendant was charged as "owner" with procuring a ship to be fitted out for slave trading. See also *U. S. vs. Simmons*, 96 U. S., 360, 363; *Coffin vs. U. S.*, 156 U. S., 432, 448.

Nowhere is a hard-and-fast rule prescribed that there must be no specifying how the aiding and abetting was done. On the contrary, the courts have been careful to say, "there are doubtless cases where more particularity is required * * * the course has been to leave every class of cases to be decided very much on its own peculiar circumstances (*U. S., vs. Gooding, supra*).

Peculiar circumstances surround the present indictment. It charges Schue with *not* doing a certain thing, and the plaintiffs in error with aiding and abetting him beforehand in *not* doing it. Counsel have been unable to find any other case where a person is charged with helping another in negative conduct. Where a positive act is done, there is a definite center from which to work in discovering how another may have aided in the act. But where *nothing* is done, the mind gropes in infinitude. How did they "aid" Schue in *not* registering? As the evidence shows, they had never met Schue. They were engaged in multifarious political activities. Was Schue influenced by printed leaflets, form, letter, speech, song, public exhortation, private appeal? And when? Where? The indictment says, "before." How long before? All they could know till the moment of trial was, they were charged with "aiding" a man unknown to them, somewhere in Cleveland, sometime before the registration, *not* to register. It was a legal ambush into which they were driven blindfold.

The offense, if at all, is a statutory misdemeanor. There is no "aiding and abetting" a misdemeanor at common law. The words, therefore, have not a strict technical meaning,

as at common law. They are "to be understood as in the common parlance, and import assistance, co-operation, and encouragement."

U. S. vs. Gooding, supra.
U. S. vs. Lombardo, 241 U. S., 73.

The words have no strict technical meaning, the reasoning of Mr. Justice Wood, in *U. S. vs. Britton,* 107 U. S., 655, on a similar phrase, is applicable.

> "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle.' * * * They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one" (cited and emphatically approved by Mr. Justice Field in his dissenting opinion in *Evans vs. U. S., supra*).

The words "aid, abet, counsel, command, and induce" are generic terms. They are conclusions, not facts. Facts are to be stated, not conclusions.

U. S. vs. Cook, 17 Wall., 168.
U. S. vs. Cruikshank, 92 U. S., 542.

As these generic terms are applicable to many different kinds of facts, how may we know which set of facts was found by the grand jury to constitute "aiding and abetting?" The grand jury may have based its indictment on an entirely different set of facts from those on which the petit jury was asked to base its verdict.

The logic of Mr. Justice White, in his dissenting opinion in *Rosen vs. U. S.*, 161 U. S., 29, 43, applies here:

> "* * * how can it be said that there has been such a presentment, when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to the obscene? * * * The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else have power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards."

The plaintiffs in error were entitled to know not only the "nature" but the "cause" of the accusation. What were the facts which caused the grand jury to charge them with this offense? The field of conjecture left open by the vague wording of the indictment is so wide that the plaintiffs in error were deprived of their constitutional right.

X. *Accessories to a Statutory Misdemeanor.*

In misdemeanors there are no accessories either before or after the fact.

U. S. vs. Sykes, 58 Fed. R., 1000.
Charge to Grand Jury, 2 Curt. (U. S.), 637; 30 Fed. Cas. No. 18,250.
U. S. vs. Hartwell, 3 Cliff., 221; 26 Fed. Cas. No. 15,318.
U. S. vs. Gooding, 12 Wheat., 460.

The indictment, however, attempts to charge the plaintiffs in error with being accessories before the fact to a statutory misdemeanor. No such offense being known to the common law, has it been created by statute? In *U. S. vs. Gooding, supra*, and other cases where persons were charged

with aiding and abetting a statutory misdemeanor, the statute creates the offense and provides the punishment for those who directly or indirectly by aiding and abetting commit the deed. No such provision for those "aiding and abetting" is found in the Selective Service Act, unless in section 6 ("any person who * * * otherwise evades or aids another to evade the requirements of this act"). But it would seem that clause is limited to those charged with the duty of carrying into effect the provisions of the act.

The indictment follows not the language of section 6, however, but section 332, Criminal Code: "Whoever directly commits any act constituting an offense defined by any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

But this is not a penal statute creating new offenses; it regulates the punishment of offenses already created. It is not worded like a statute creating new offenses. "The legislative authority must first enact a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

U. S. vs. Hudson, 7 Cranch, 32.
U. S. vs. Brewer, 139 U. S., 278.
U. S. vs. Lacher, 134 U. S., 624.
Ballew vs. U. S., 160 U. S., 187.
U. S. vs. Eaton, 144 U. S., 677.

As a criminal statute it would be void for indefiniteness, "offering no standard of conduct it is possible to know in advance and comply with."

International Harvester Co. vs. Kentucky, 234 U. S., 216.
Tozer vs. U. S., 52 Fed. R., 917, 919.

The history of section 332 bears out this view. It was taken partly from Rev. St. 5323 ("Every person who knowingly aids * * * to commit any murder * * * is an

accessory before the fact") and Rev. St. 5427 ("Every person who * * * aids or abets * * * in the commission of any felony denounced in the three preceding sections," etc.), and made of general application. "Where the charge is of crime, it must have clear legislative basis."

U. S. vs. George, 228 U. S., 14.
Williamson vs. U. S., 207 U. S., 425.

The misdemeanor with which Schue is charged is the violation of not a statute, but a regulation or proclamation of the executive department. The Supreme Court has carefully distinguished between a thing "required by law" and a thing required only by regulation. Unless the regulation is clearly within the authority conferred by the statute, a violation of it has been held not to be a violation of a thing required "by law."

U. S. vs. Eaton, 144 U. S., 677.
U. S. vs. George, 228 U. S., 14.

With this scrupulous care against allowing offenses to be created "by regulation," it would seem that where the Selective Service Act itself has not seen fit to extend its punitive clauses to the wide and ill-defined field of indiscreet disobedience, the court is not justified in the inference that the legislative power meant to prescribe a punishment for "aiders and abettors" as well as for those who directly disobey the President's proclamation and regulation. If Congress had meant to extend its punitive power so far, it could easily have said so.

XI. *The Selective Service Act is unconstitutional and void in all its parts, for the reasons following:*

A. *Its Terms are Beyond the Powers of Congress.*

The "main design" of the act is to provide for calling forth the "militia" designated as such by the National Defense Act of June 3, 1916, section 57.

The power of Congress here is limited to three purposes: "to execute the laws of the union, suppress insurrections, and repel invasions."

Constitution, art. I, sec. 8, c. 15.

The main design of the act is not within these limitations. It is to send armies abroad to engage in a foreign war. The amendment of June 1, 1917, which refers to "serving without the United States," and the President's proclamation, indicate this. It refers to "the existing emergency," which is not within these limitations, as the court may take judicial notice.

United States vs. Hamburg American Co., 239 U. S., 466.

The title is: "An Act to authorize the President to increase temporarily the Military Establishment of the United States."

Compare it with the act of February 28, 1795:

> "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia," etc.

And with the Draft Act of March 3, 1863:

> "Whereas there now exists in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion," etc.

This court has often held that when the terms of a statute are so broad as to extend beyond the power of Congress, the courts are not at liberty to introduce words of limitation to bring it within that power.

The Trademark Cases, 100 U. S., 82.
James vs. Bowman, 190 U. S., 127.

U. S. vs. Reese, 92 U. S., 214.
U. S. vs. Ju Toy, 198 U. S., 253.
McKenzie vs. Hare, 239 U. S., 299, 308.

If the "main design" is beyond the limited power of Congress, the registration clause, with its punitive provision, is also void, being merely auxiliary.

Virginia Coupon Cases, 114 U. S., 269.

But it will be urged, Congress derives its power herein not from the clause recited but from article I, section 8, clause 12: "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

The Supreme Court has never passed on this question. In *Martin vs. Mott,* 12 Wheat., 33, it held the act of February 28, 1795, valid. But that act authorized the President, in cases of invasion, &c., to call forth the militia by requisition on the Governors of States. In *Kneedler vs. Lane,* 45 Pa. St., 238, the Pennsylvania judges rendered an opinion on the Draft Act of 1863. But that decision is not in point here because: (1.) the act of 1863 was expressly for suppressing insurrection, and (2.) it was finally decided that the act of 1863 was not a calling forth of the "militia," but a raising of armies.

If the power "to raise and support armies" implies enforced levies upon the citizenship of the States when necessary, and this power is unrestricted by the limitations on calling forth the militia, it may be conceded the Congress might proceed to raise armies in that way. But that cannot be contended for the present act, since the National Defense Act, section 57, has designated the men drafted hereunder as "militia." If "militia," Congress can call them into the service of the United States only in the manner and for the limited purpose described.

But it may be urged the "militia" drafted directly by the

Federal Government under this act is a national militia, as distinguished from the State militia. As the Constitution does not so distinguish, it would be highly presumptuous to discover such a blighting distinction lurking among the implied powers attendant upon the power "to raise and support armies."

It is unbelievable that the framers of the Constitution, who so jealously guarded and limited the Federal Government's power to call forth the State's militia, lest it strip from the State and the people that which their race-history had taught them to cherish as the shield of their liberties against despots, meant at the same time to leave an implied power whereby Congress might accomplish the very thing. The two powers, of State and Federal Government, over the same "militia" are mutually destructive. They are incompatible.

The purpose of the framers of the Constitution was to guard against encroachments by the central authority upon the liberties of the people. They feared a big army under its control. That fear shows itself in many clauses. Thus, they limited "appropriations of money to that use" to two years. They reserved "to the States respectively the appointment of the officers and the authority of training the militia." They declared "a well-regulated militia" to be "necessary to the security of a free State," and forbade infringement of "the right of the people to keep and to bear arms." These elaborate precautions for guarding the front door against encroachments of the Federal power are rendered ridiculous if the Federal Government may enter by a back door and possess itself of the militia.

The militia was a State institution before any Federal Government was created. Every State constitution provides for it. Every State has the undoubted power to draft its male citizens as a part of its militia. There is no evidence of any intention to relinquish any of this State power to the Federal Government. On this, as other subjects, all powers not delegated were reserved (Amendment X).

It is significant all English colonies—Canada, Australia, etc.—view the "militia" as a home defense, not subject to be drafted by the central power for foreign service. England depended on voluntary enlistments for foreign service until recently, when she changed her unwritten constitution by an act of parliament.

Stephens Commentaries on the Laws of England (15th ed.), II, chap. 8, page 646.

Madison in "*The Federalist*," No. XLVI.

Opinion by Judge Advocate General Crowder, to the Secretary of War, December 29, 1911.

Opinion by Mr. Wickersham, Attorney General, to the Secretary of War, February 17, 1912.

"*Opinions of Attorney General*," vol. 29, page 322.

"*An Address to the Congress of the United States*," by Mr. Hannis Taylor, recently published.

B. *It Attempts an Unconstitutional Delegation of Power.*

The power of Congress "to raise armies" is a direct power. But it may only "*provide* for calling forth the militia," implying that the actual calling forth is to be done for another than Congress.

As already shown, the Selective Service Act cannot be an exercise of the power to provide for calling forth the militia. But if it be an exercise of the power "to raise and support armies," Congress has delegated to the President the power which was entrusted only to it. It cannot delegate its power thus (*Cooley's Constitutional Limitations*, 7th ed., page 163). It may delegate power to determine some fact, but not to "make a law" (*Field vs. Clark*, 143 U. S., 683; *Monongahela Bridge Co. vs. U. S.*, 216 U. S., 177). The test is "whether Congress legislated on the subject as far as was reasonably practicable" (*Butterfield vs. Stranchan*, 192 U. S., 470; *Red Oil Mfg. Co. vs. Board of Agriculture*, 22 U. S., 380).

The Selective Service Act begins: "That in view of the existing emergency * * * the President be, and he is hereby, authorized—First, Immediately to raise." * * * Such are the provisions throughout. Everything is left to the President's "discretion." His powers are practically unlimited.

The fatal weakness of the present act is shown by comparison with the Draft Act of March 3, 1863: "Be it enacted * * * That all able-bodied male citizens * * * except as hereinafter excepted, are hereby declared to constitute the national forces," etc. Congress there raised the army itself.

If Congress may delegate thus its power to "raise" armies, it may also delegate to the President its power to "support" armies. And, if to the President, why not to any one else?

English history forbids the idea that the framers of the Constitution meant the power of raising armies to be exercised by any other than the legislative body directly responsible to the people. The Civil War of 1645-9 had been fought between armies raised by King Charles I and those raised by Parliament.

> "Under the guise of regulation, legislation cannot be exercised."
>
> *United States vs. George,* 228 U. S., 14, 20.
> *United Verde Copper Co.,* 196 U. S., 207.

C. It Violates the States' Right of Appointment of Officers and Authority to Train the Militia.

Returning to the other horn of the dilemma, if the Selective Service Act be an exercise of the power to "provide for calling forth the militia," it violates article I, section 8, clause 16, which reserves "to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

The act throughout authorizes the President "to draft

* * * organize, *and officer,*" etc. "To raise by draft * * * and to provide the necessary officers," etc. "The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training," etc.

D. *It Usurps Judicial Power.*

The act, section 4, authorizes the President, "in his discretion, to create and establish throughout the States * * * local boards. * * * Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the military establishment, to be chosen from among the local authorities. * * * Such boards shall have power * * * to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for *including or discharging individuals or classes of individuals* from the selective draft," etc. District boards are also authorized, with power "to review on appeal, and affirm, modify or reverse any decision of any local board. * * * The decisions of such district boards shall be final," subject to review by the President. * * * "Any member * * * may be removed and another appointed by the President, whenever he considers that the interest of the nation demands it."

The Constitution, Art. I, sec. 8, clause 9, empowers Congress "to constitute tribunals inferior to the Supreme Court." Viewed as tribunals, these "boards" are not inferior but independent of the Supreme Court. Moreover, they are not constituted by Congress itself, the power to create them is delegated to the President. By Art. III, sec. 1, "the judges * * * shall hold their offices during good behavior, and shall at stated times receive for their services a compensation." None of these safeguards to an independent judiciary obtain.

It will be urged they perform only a ministerial function, but that is not true. That they are called "boards" is immaterial. We must look to "the substance and intent" (*United States vs. Ferreira*, 13 How., 40). The claims to be decided are not mere claims against the government for damages etc., as in *U. S. vs. Ferreira, supra*, and *U. S. vs. Ritchie*, 17 How., 525. Nor preliminaries to a court finding, as in the latter case. The question involved is the personal liberty of the citizen, of which he is not to be deprived without "due process of law" (Constitution, Amendment V). The Selective Service Act attempts to make the registration strip the citizen automatically of his civil rights, his right of recourse to the ordinary courts, etc. (Sec. 5) "All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom," etc.

This is judicial power, and must be exercised by the regular judicial tribunals, unless the citizen whose liberty is involved be in the military or naval service (*"Ex parte Milligan*, 4 Wall., 447; Fong Yue Ting *vs.* U. S., 149 U. S., 698, particularly the dissenting opinions of Mr. Justice Brewer, Mr. Justice Field, and Chief Justice Fuller. See also *Interstate Commerce Commission vs. Brimson*, 154 U. S., 447).

The only alternative is, that the citizen thus subjected to the decision of the "boards" is already in the military or naval service. The Constitution, art. 1, sec. 8, clause 16, empowers Congress "to provide for organizing, arming and disciplining the militia and the governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

In the Constitutional Convention, "Mr. King, by way of explanation, said that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying

the kind, size and calibre of arms—and by *disciplining*, prescribing the manual exercises, evolutions, etc."

Elliot's Debates on the Federal Constitution (Lippincott, 1907), vol. V, page 464.

As the power of Congress to *govern* the militia is restricted to "such part of them as may be employed in the service of the United States," it cannot extend to citizens not yet so "employed." The Selective Service Act does not by its terms justify such a construction. It is different from the Draft Act of 1863, which enacted "that all able-bodied citizens are hereby declared to constitute the national forces." It merely declares certain citizens "subject to draft into the forces hereby authorized, unless," etc.

It follows that the citizens whose liberties are affected are not yet in the military or naval forces of the United States, and the Federal Government has no power under the Constitution to deprive them of their right to resort to the judicial tribunals provided by law. The "boards" which Congress has attempted to authorize the President to establish, subject entirely to his will, are unconstitutional, both in the method of their establishment and their functions.

E. *It Deprives Citizens of the Due Process of Law.*

The act requires certain persons, under penalty, to register; it subjects those registered persons to the final decision of "boards" on whether they shall be forced into the military service or left free to follow their usual avocations; said "boards" are governed in their procedure, not by the rules of law, but by rules and regulations prescribed by the President. This clearly deprives such persons of their liberty without due process of law.

Constitution, Amendment V.

Due process of law means the same as "by the law of the land" in Magna Charta (*Murray's Lessee vs. Hoboken Land*

Co., 18 How., 272). Magna Charta, among other securities of rights and liberties, declares: "nor will we, (the king) proceed against him, *nor send anyone against him by force of arms,* unless according to the sentence of his peers, or by the law of the land." This should protect a citizen against the use of military power to deprive him of his personal liberty until after due process of law.

> "The words 'by the law of the land' as used in the Constitution do not mean a statute passed for the purpose of working the wrong."
>
> Cooley's Constitutional Limitations, 1st ed., chap. XI, page 354.

> "They were intended to secure the individual from the arbitrary exercise of the powers of government; unrestrained by the established principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> *Yick Wo vs. Hopkins,* 118 U. S., 356, 369.

No statute could leave more "room for the play and action of purely personal and arbitrary power" than the Selective Service Act. It leaves to the President complete control of the "boards," their members, their rules of procedure, etc. It leaves him completely in control as to how many are to be drawn for military service, when, and who. In addition to all specified numbers, he may raise "such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength" and "such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary." He is to decide when to stop voluntary enlistments and resort to draft; he prescribes the regulations for the draft; the drafted ones are to serve for no fixed time, but for "the existing emergency," which presumably he is to determine the length of; as he prescribes the rules and regulations for the exemp-

tion boards which he creates, he may determine what religious sects are to be recognized as entitled to exemption and what not; he may draft for partial military service county and municipal officials, artificers, workmen, and other persons employed in the service of the United States, pilots, mariners, etc. He "may utilize the service" of any or all officers of the several States, etc., "and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or territory, to perform any duty in the execution of this act, are hereby required to perform such duty as the President shall order or direct," disobedience being made a misdemeanor.

If this be not leaving "room for the play and action of purely personal and arbitrary power," it is difficult to imagine what would be. A despot could ask no more. It makes no practical difference whether the depository be entitled King or President, the personal and arbitrary power at which Magna Charta and Amendment V were aimed is created by this act.

XII. *Refusal of Examination of Jurors on Whether They Confused Socialists with Anarchists.*

In order to exercise their right of challenge, the defendants attempted to question the petit jury on their *voir dire.* to ascertain if they confused Socialists with anarchists. The court declined to allow this line of investigation.

This was error, as defendants were entitled to inquire into the fitness of the persons called.

State vs. Steeves, 29 Ore., 96.
Hale vs. State, 72 Miss., 140.

The defendants were Socialist party officials; their political activities were directly involved. The court was bound to take judicial notice of the fact that anarchists have been legislated against and are the subject of widespread popular

disapprobation and prejudice. It was of extreme importance to the defendants, in the impassioned state of the public mind, that they ascertain beforehand and protect themselves by challenge in case any person drawn for jury service confused them with the anarchists.

Respectfully submitted,

JOSEPH W. SHARTS.
MORRIS H. WOLF,
Attorneys for Plaintiffs in Error.

FILE COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and Charles Baker, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA. } No. 656.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

JOSEPH F. ARVER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 663.

ALFRED F. GRAHL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 664.

OTTO WANGERIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 665.

WALTER WANGERIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 666.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

15011—17

LOUIS KRAMER AND MORRIS BECKER, plaintiffs in error, *v.* THE UNITED STATES.	No. 680.
LOUIS KRAMER, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 681.
EMMA GOLDMAN AND ALEXANDER BERKMAN, plaintiffs in error, *v.* THE UNITED STATES OF AMERICA.	No. 702.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cases for joint hearing on a day convenient to the court.

These cases are commonly known as the "Selective Draft Law" cases.

No. 656 is a direct writ of error to the District Court of the United States for the Northern District of Ohio. Plaintiffs in error therein were convicted of aiding, abetting, counseling, commanding, inducing, and procuring one Alphons J. Schue to fail and refuse to appear and register himself as required by the so-called "Selective Draft Act" of May 18, 1917, and the proclamation of the President issued pursuant thereto on the same date, in violation of

section 332 of the Criminal Code. They were sentenced to imprisonment for one year in the Stark County Workhouse at Canton, Ohio. All are at large on bail.

Nos. 663 to 666, inclusive, are direct writs of error to the District Court of the United States for the District of Minnesota. Plaintiffs in error therein were convicted for failing to appear and register themselves, in violation of the act and the proclamation hereinbefore mentioned. They were sentenced, respectively, to imprisonment for one year in various jails specified in the respective judgments of the District Court. All are at large on bail.

No. 680 is a direct writ of error to the District Court of the United States for the Southern District of New York. Plaintiffs in error therein were convicted of a conspiracy to commit an offense against the United States, to wit, to aid, abet, counsel, command, and procure divers persons to fail to appear and register themselves as required by the act and proclamation hereinbefore mentioned, in violation of section 37 of the Criminal Code. Kramer was sentenced to imprisonment for a period of two years in the Federal penitentiary at Atlanta, and to pay a fine of $10,000, and is now serving his sentence because of failure to furnish bail in the amount specified. Becker was sentenced to imprisonment for a period of one year and eight months in the same penitentiary, but was enlarged on bail.

No. 681 is a direct writ of error to the District Court of the United States for the Southern District

of New York. Plaintiff in error therein, who is also one of the plaintiffs in error in No. 680, was convicted for failing to appear and register himself, in violation of the act and proclamation hereinbefore mentioned. He was sentenced to imprisonment for a period of one year in the Mercer County Prison, New Jersey, the imprisonment to start at the expiration of his imprisonment in the penitentiary at Atlanta imposed under the indictment in No. 680.

No. 702 is a direct writ of error to the District Court of the United States for the Southern District of New York. Plaintiffs in error therein were convicted of a conspiracy to commit an offense against the United States, to wit, to aid, abet, counsel, command, and procure divers persons to fail to appear and register themselves as required by the act and proclamation hereinbefore mentioned, in violation of section 37 of the Criminal Code. Goldman was sentenced to imprisonment in the State Penitentiary of Jefferson City, Mo., for a period of two years and to pay a fine of $10,000. Berkman was sentenced to imprisonment for a similar period in the Federal Penitentiary at Atlanta, Ga., and to pay a fine in the same amount. Both are at large on bail.

While the various records in these respective cases contain many assignments of error alleging certain errors to have been committed during the course of the trials, the principal proposition which the assignments of error in all of the cases assert is that the "Selective Draft Law" is unconstitutional.

If, because of the large number of cases, coming as they do from various districts in the United States and requiring the attention of a number of counsel on behalf of the various plaintiffs in error, the court deems it inadvisable to set the cases down for joint hearing, then it is requested that the cases be advanced and set down for hearing on the same date.

The cases are of importance to the Government in enforcing the criminal provisions of the law involved as well as in the administration of the provisions governing the drafting and assembling of the army, and for these reasons it is requested that the cases be advanced to the earliest date practicable.

Notice of this motion has been served on opposing counsel in all cases.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1917.

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SUPREME COURT

In the Supreme Court of the United States

OCTOBER TERM, 1914

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Also eight other cases standing for hearing with the preceding case, viz:

JOSEPH E. ARNOW, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

ALFRED F. CRANE, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

OTTO WAGENKNECHT, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

WALTER WAGENKNECHT, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

LOUIS KRAMER AND MORRIS BERGER, PLAINTIFFS IN ERROR, v. THE UNITED STATES.

LOUIS KRAMER, PLAINTIFF IN ERROR, v. THE UNITED STATES.

EMMA GOLDMAN AND ALEXANDER BERKMAN, PLAINTIFFS IN ERROR, v. THE UNITED STATES.

ALBERT JONES, APPELLANT, v. E. W. DONALDSON, DEPUTY UNITED STATES MARSHAL, AND M. C. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA.

BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE, 1914

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SELECTIVE DRAFT LAW CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 656.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

JOSEPH F. ARVER, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 663.

ALFRED F. GRAHL, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 664.

OTTO WANGERIN, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 665.

WALTER WANGERIN, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 666.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

LOUIS KRAMER AND MORRIS BECKER, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES.	No. 680.
LOUIS KRAMER, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 681.
EMMA GOLDMAN AND ALEXANDER BERKMAN, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES.	No. 702.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALBERT JONES, APPELLANT, *v.* H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA.	No. 738.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases are alike in that all of them are brought to this court by direct writ of error or appeal under section 238 of the Judicial Code. All of them assert as a basis for jurisdiction the unconstitutionality of the Selective Draft Law of May 18, 1917 (Public No. 12, 65th Cong.).

They are further alike in that the only section of that law with which any of the plaintiffs in error have so far come into collision is section 5, which provides—

> That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the dis-

trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Thus plaintiffs in error Joseph F. Arver (No. 663), Alfred F. Grahl (No. 664), Otto Wangerin (No. 665), Walter Wangerin (No. 666), and Louis Kramer (No. 681) were indicted and convicted of having wilfully failed and refused to present themselves for registration or to submit thereto as in said section provided.

Appellant Albert Jones (No. 738) was taken before a United States Commissioner for the Southern District of Georgia upon a warrant charging the same offense, and, in default of bail, was committed to answer an indictment. He thereupon sued out

a writ of habeas corpus from the District Court of the United States for that district, which court, upon hearing, dismissed the petition. 243 Fed. 997. From this order he appeals.

Plaintiffs in error Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker (No. 656) were indicted in the District Court of the United States for the Northern District of Ohio under section 5 aforesaid and section 332 of the Criminal Code upon the charge that they did unlawfully aid, abet, counsel, command, induce, and procure one Alphons J. Schue in unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto; while plaintiffs in error Louis Kramer and Morris Becker (No. 686) and plaintiffs in error Emma Goldman and Alexander Berkman (No. 702) were indicted in the District Court of the United States for the Southern District of New York under section 5 aforesaid and sections 37 and 332 of the Criminal Code, and were convicted of the offense of conspiring to aid, abet, counsel, command, induce, and procure divers persons to wilfully fail and refuse to present themselves for registration and to submit thereto.

All of the cases challenge upon various grounds the constitutionality of the Selective Draft Act as a whole and of various provisions thereof. In some of the constitutional objections urged it is clear that none of these plaintiffs in error has any personal interest, since their rights have not yet been infringed.

All of the objections are believed to be so entirely without foundation, either in reason or precedent, that a motion to dismiss the writs of error and the appeal as frivolous would properly lie.

In *Ruthenberg and others* v. *The United States*, No. 656, *Louis Kramer and Morris Becker* v. *The United States*, No. 680, and *Berkman and Goldman* v. *The United States*, No. 702, errors are assigned aside from the constitutional question. In the latter two cases the sole additional question is whether the facts warranted the convictions. In the *Ruthenberg* case it is contended that various trial proceedings violated the Constitution. In all three cases, we submit that if the constitutional questions under the act are so lacking in merit as to warrant dismissal of the writs of error the other assignments must fall also.

The Government's brief, therefore, is divided into two parts: Part one, *the constitutionality of the act*, in which an effort is made to answer *seriatim* all the various grounds to the contrary which are urged by any of the plaintiffs in error; and, part two, *other errors assigned*.

PART ONE.

THE CONSTITUTIONALITY OF THE ACT.

BRIEF OF ARGUMENT.

I. Congress has power to raise armies for both domestic and foreign service by selective draft. Constitution, Article I, section 8.

1. The power "to declare war" includes the power to compel military service.

2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

(*a*) That the power to compel military service is an incident of sovereignty appears from the custom of nations.

(*b*) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.

(*c*) The history of this clause in the Convention shows a definite intent not to limit the Nation to voluntary enlistments.

(*d*) The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.

(*e*) Our national history demonstrates the existence of the power by its exercise.

(*f*) The decisions of the courts uniformly recognize the power of the Government to compel military service.

(*g*) There is not, as asserted, any common-law right of a soldier not to be sent out of the country.

II. The Selective Draft Law infringes no provision of the Constitution concerning the militia.

1. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.

(*a*) The power granted to Congress over the militia of the States (Constitution, Art. I, sec. 8, clauses 15, 16) is not in limitation but in extension of the power to raise an army (clause 12).

(*b*) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.

2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the draft law is not that of militiamen but of citizens.

(*a*) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.

(*b*) Members of the National Guard also are called out, not as militiamen but as citizens of the United States.

3. Assuming *arguendo* that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.

III. The Selective Draft Law imposes neither slavery nor involuntary servitude.

IV. The act is not unconstitutional on the ground that State officials aid in its enforcement.

V. The act does not delegate legislative authority to administrative officials.

VI. The act does not infringe the provisions of the Constitution concerning the judicial power. Article I, section 8, clause 9; Article III, sections 1 and 2.

VII. The due process clause is not violated.

VIII. The Selective Draft Law neither establishes a religion nor prohibits its free exercise.

IX. Other constitutional questions under the act.

ARGUMENT.

I.

CONGRESS HAS POWER TO RAISE ARMIES FOR BOTH DOMESTIC AND FOREIGN SERVICE BY SELECTIVE DRAFT. CONSTITUTION, ARTICLE I, SECTION 8.

The highest duty of every citizen is to serve his country in time of need. The duty of the arms-bearing population to respond to the call of the Nation is inherent in the nature of citizenship. The obligation has been explained as in the nature of an implied contract. In the early constitutions of five States it was agreed that the individual consents to render military service in return for protection to life, liberty, and property (*infra*, p. 18). Vattel, whose "Law of Nations" appeared in 1758, on the other hand, emphasized the rights of the sovereign, rather than the duties of the subject. After stating that "no person is naturally exempt from taking up

arms in defense of the State, the obligation of every member of society being the same," he submitted that "society can not otherwise be maintained." Book 3, c. 2, secs 8 and 10. This obligation of the citizen to his nation is fundamental and universally recognized.

It would be strange indeed if, alone among the nations, the Government of the United States, ordained and established to "provide for the common defence" and to "secure the blessings of liberty to ourselves and our posterity," were prohibited by its organic law from using those means approved by the common experience of mankind as essential to such protection and security. It would be a contradiction in terms to declare the Government of the United States a sovereign, endowed with all the powers necessary for its existence, yet lacking in the most essential of all—the power of self-defense. And it would be a melancholy reflection upon the Constitution making of 1787, coming as it did after the disastrous effects of the Confederation's lack of power to command directly the military service of the citizens of the States had been deeply felt, if the Government which then arose were no better equipped than its predecessor.

As might be anticipated, therefore, the Constitution is explicit in its grants of plenary power. Article I, section 8, provides:

> The Congress shall have power—
>
> (Cl.) 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and

> provide for the common defence and general welfare of the United States; * * *
>
> (Cl.) 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> (Cl.) 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> (Cl.) 13. To provide and maintain a navy;
>
> (Cl.) 14. To make rules for the government and regulation of the land and naval forces;
>
> (Cl.) 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof.

The purpose of these wide grants of power was expressed in the preamble:

> We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

1. The power to declare war includes the power to compel military service.

The power granted to declare war involves the power to carry it on successfully. The means necessary to that end are granted. Article I, section 8,

clause 18, makes this clear. To quote again from Vattel:

> As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, has also naturally that of raising troops. (Book 3, c. 2, sec. 7.)

In *United States* v. *Sugar*, 243 Fed. 423, 436, the court, in quoting from *Knoedler* v. *Lane*, 45 Pa. St. 238, said:

> * * * "The power to declare war necessarily involves the power to carry it on, and this implies the means, saying nothing now of the express power 'to raise and support armies,' as the provided means. * * * But the power to carry on war, and to call the requisite force into service, inherently carries with it the power to coerce or draft. A nation without the power to draw forces into the field, in fact would not possess the power to carry on war. The power of war, without the essential means, is really no power; it is a solecism."

2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

As to method, the power conferred upon Congress to raise armies is as broad as language can make it. The only restriction refers to appropriations in support of the armies raised. There is no proviso such as plaintiffs in error seek to insert:

> *Provided*, That no person shall be compelled to do military duty otherwise than by voluntary enlistment.

Nor is there any limitation in any other section of the Constitution.

We deal here, not with powers implied but with express grants. Congress is expressly empowered to use all means necessary and proper to the exercise of the power to raise armies. Any method may be employed within the discretion of Congress which does not in itself violate rights guaranteed by other clauses of the Constitution. Voluntary enlistment if deemed appropriate, may be tried. If under the circumstances Congress provides for a selective draft as the means considered necessary, the Constitution contains no prohibition. Authorization to employ either method is expressed.

In the classical language of the Chief Justice in *McCulloch* v. *Maryland*, 4 Wheat. 316:

> (p. 407) * * * In considering this question, then, we must never forget that it is a *constitution* we are expounding.
>
> (p. 409) The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.
>
> (p. 415) * * * The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence

> could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

Only sheer hardihood would seriously deny that among the appropriate means to which Congress may resort in raising armies is the selective draft. Indeed, it requires no extended argument to show that it is not only an appropriate means but under the conditions of modern warfare the most prudent, just, and equitable method which can be employed. Under present conditions war is not a matter of men, but of nations. All of the resources of the

combatants, human and material, are thrown into the scale. As it is in the power of the Government to compel, so it is the duty of all its citizens to give, regardless of personal preference, the service which they can most efficiently render. Those who bear the responsibility of leadership must have also the power to assign every citizen to the station he is best qualified to fill. The armies in the field must be equipped and maintained by the producers and artisans at home, and men must serve the one or the other purpose as the necessities of the occasion require. Nor is it any longer just to leave the performance of military duties only to the most ardent and patriotic, instead of distributing them with equity over the population as a whole. It can not be necessary to vindicate the legislative discretion by enlarging upon this theme.

(a) **That the power to compel military service is an incident of sovereignty appears from the custom of nations.**

The Constitution establishes the United States of America as a sovereign nation. In its field, to carry out powers expressly granted, it has all the rights of any similar sovereignty. These include, for instance, the power to take dependencies. *De Lima* v. *Bidwell*, 182 U. S. 1; *Mormon Church* v. *United States*, 136 U. S. 1, 42. Incident to its control over international relations, as every other nation, it may exclude aliens. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705–708, 711. Like other sovereigns, it may exercise the power of eminent domain. *United States* v. *Jones*, 109 U. S. 513,

518. We may test its right to employ the power of conscription by the same comparison.

That compulsory military service is enforced by practically all the nations of the globe at the present time is a matter of common knowledge. Of this the court may take judicial notice. References properly and readily available to the court are as follows: The Americana, vol. 5, title "Conscription"; Ency. Brit., 11th ed., vol. 6, title "Conscription"; Pamphlet issued by Army War College, November, 1915, entitled "Statistical Comparison of Universal and Voluntary Military Service." [1]

See the conscription act of Great Britain, entitled "Military Service Act," January 27, 1916, 5 and 6 George V, c. 104, p. 367; amended by the Military Service Act of 1916, May 25, session 2, 6, and 7, George V, c. 15, p. 33; the recent Canadian conscription act, entitled "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September

[1] The Statesman's Yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1360; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353.

20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic "De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

The treaties of the United States afford further evidence of the prevalence of compulsory military service in other countries, for provisions are common in them which exempt consuls and citizens of the United States from military service in the forces of the treaty nation.[1] In several naturalization treaties

[1] See Malloy, Treaties, Conventions, etc. (1910), vols. 1, 2; edition by Charles (1913), vol. 3; Argentine Republic, 1853, Art. X, p. 23; Austria-Hungary, 1870, Art. II, 40; Belgium, 1880, Art. III, 95; Congo, 1891, Art. III, 329; Costa Rica, 1851, Art. IX, 344; Greece, 1902, Art. III, 856; Hayti, 1864, Art. V, 922; Honduras, 1864, Art. IX, 955; Italy, 1871, Art. III, 970; Japan, 1894, Art. I, 1029; Japan, 1911, Art. I, Charles, vol. 3, p. 78; Mexico, 1831, Art. IX, 1088; Paraguay, 1859, Art. XI, 1367; Roumania, 1881, Art. III, 1506; Servia, 1881, Art. IV, 1615; Spain, 1902, Art. V, 1703; Sweden, 1910, Art. III, Charles, vol. 3, 113; Switzerland, 1850, Art. II, 1764; Salvador, 1870, Art. 29, 1560; Tonga, 1886, Art. IX, 1782; Venezuela, 1860, Art. II, 1846.

also it is provided that citizens of the treaty nation in certain cases may be compelled to render military service on return to their original land.[1]

(b) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.

The most reluctant must concede that the grant of power to raise armies includes the use of such means as were known and customarily exercised in this country in 1787. It is important therefore to note that the compulsory draft was expressly recognized in many constitutions of the several States, was enforced by the States for local purposes in calling out the militia, and also for obtaining levies to fill up the ranks of the Continental Army.

The constitutions of five States during the Revolutionary War period express the principle of universal military service. Article 8 of the constitution of Pennsylvania of 1776 provides:

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto. (Thorpe, American Charters, Con-

[1] Austria-Hungary, 1870, Art. II (Malloy, vol. 1, p. 46); Baden, 1868, Art. II (*id.* 54); Belgium, 1868, Art. III (*id.* 80); Sweden and Norway, 1869, Art. II (*id.* 1760); Wurttemberg, 1868, Art. II (*id.* 1897).

stitutions and Organic Laws, vol. 5, pp. 3081, 3083.)[1]

New Hampshire, in the constitution of 1784, part 1, article 13, provided:

> No person who is conscientiously scrupulous about the lawfulness of bearing arms shall be compelled thereto provided he will pay an equivalent.[2] (Thorpe, vol. 4, p. 2455.)

Militia duty was imposed upon all arms-bearing citizens of the original thirteen States during the 18th century. This duty was not regarded as voluntary. Militia commanders were given discretionary power by the State statutes to detach or to draft militiamen either by classes or as individuals. Exemptions were

[1] See language almost precisely similar in the Constitution of Vermont, 1777, c. 1, Art. 9 (Thorpe, vol. 6, pp. 4747, 3740); Vermont, 1786, c. 1, Art. 10 (*id.*, vol. 6, 3753); Vermont, 1793, c. 1, Art. 9 (*id.*, vol. 6, 3762, 3763); New York, 1777, Art. 40 (*id.*, vol. 5, 2637); Massachusetts, Bill of Rights, 1780, Art. 10 (*id.*, vol. 3, 1891); New Hampshire, 1784, pt. 1, Bill of Rights, Art. 12 (*id.*, vol. 4, 2455); Constitution of New Hampshire, Bill of Rights, Art. 12 (*id.*, vol. 4, 2471).

[2] Similar provisions were in the constitutions of New York, 1777, art. 40 (Thorpe, vol. 5, 2637); Pennsylvania, 1776, art. 8 (*id.*, vol. 5, 3083); Vermont, 1777, c. 1, art. 9 (*id.*, vol. 6, 3740–41); Vermont, 1786, c. 1, art. 10 (*id.*, vol. 6, 3753).

Other provisions in the early constitutions for compulsory military service are as follows: Massachusetts, 1780, pt. II, c. 2, art. 7 (Thorpe, vol. 3, 1901; New Hampshire, 1784, pt. 2, Executive Power (*id.*, vol. 4, pp. 2463–2464); Delaware, 1776, art. 9 (*id.*, vol. 1, 562, 564); Maryland, 1776, art. 33 (*id.*, vol. 3, 1686, 1696); Virginia, 1776, Militia (*id.*, vol. 7, p. 3817); Georgia, 1777, art. 33, art. 35 (*id.*, vol. 2, 777, 782).

granted usually for State officials and workmen engaged in peculiarly vital industrial pursuits and to Quakers, Mennonites, and other conscientious objectors. The statutes are given in Appendix "A," *infra*, p. 123.

The draft was several times appealingly recommended by the Continental Congress to the States as a means of recruiting the Continental Army. The Continental Congress, under the Articles of Confederation, articles 7 and 9, made requisitions on the States for quotas of men for the Continental battalions. Since the requisitions were not binding, the acts of the Congress took the form of suggestions to the States. The suggestions were earnestly made. The Journals of the Continental Congress afford ample demonstration that the draft was a normal method of raising armies at the time.[1]

[1] On April 14, 1777, it is recorded:

"*Resolved*, That if the several quotas of the States can not be furnished by any of the means recommended in the foregoing resolutions [bounties and exemptions to militiamen who furnish recruits], or by any other means by the said legislatures devised before the 15th day of May next, it is recommended to each State to cause indiscriminate drafts to be made from their respective militia.

"That it be recommended to the said legislatures to apply all of the means by these resolutions recommended in the manner which they shall judge most effectual for speedily completing the army, and in case they shall prove unsuccessful, that they cause drafts aforesaid to be made." Vol. 7, Ford's edition, Library of Congress, pp. 262-263; vol. 2, edition by Way & Gideon, p. 91.

February 26, 1778: "*Resolved*, That the several States hereafter named be required forthwith to fill up by drafts

Complying with the recommendations of the Continental Congress the States enacted statute after statute providing for drafting or detaching citizens

from their militia, or in any other way that shall be effectual, their respective battalions of Continental troops, according to the following arrangement: * * *

"That all persons drafted shall serve in the Continental battalions of their respective States for the space of nine months * * *." Journals of Congress, vol. 4, pp. 85 to 87; Folwell's Press, 1800. See Journals of Congress, edition of Way & Gideon, 1823, vol. 2, pp. 458, 459; Ford's edition, Library of Congress, vol. 10, pp. 199, 200.

March 9, 1779: "*Resolved*, That the above-recited clause of the said act of Congress [providing for bounties for voluntary enlistment] be repealed, and that it be earnestly recommended to the several States to make up and complete their respective battalions to their full complement by drafts, or in any other manner they shall think proper, and that they shall have their quotas of deficiencies ready to take the field, and to march to such place as the Commander-in-chief shall direct without delay." Folwell's edition, vol. 5, p. 70; Way & Gideon's edition, vol. 3, p. 223; Ford's edition, Library of Congress, vol. 13, p. 299.

Washington renewed his recommendation to Congress on November 18, 1779, for a draft as the means of maintaining the army. Sparks Writings, vol. 6, pp. 401, 404. Committee reports on the matter were made in Congress December 7, 1779. Ford's edition, vol. 15, p. 1358; Dec. 14, 1779, *id.*, vol. 15, p. 1376. An annual draft act passed in accordance with the recommendation of the Commander-in-chief on December 18, 1779. *id.*, vol. 15, p. 1393; edition by Way & Gideon, vol. 3, p. 413. A further draft act was passed February 9, 1780, Ford's edition, vol. 16, p. 150; Way & Gideon's edition, vol. 3, p. 432; Folwell's edition, vol. 6, p. 18.

A report that a spirit of enlisting among drafted men was taking place is made in vol. 3, Way & Gideon's edition, p. 38; Folwell's edition, vol. 4, p. 361.

to fill up the Continental battalions. Appendix "B," *infra*, p. 131. These statutes, it is submitted, conclude the present cases in so far as they depend upon the meaning which the framers of the Constitution attached to the power to raise armies.

(c) The history of this clause in the Convention shows a definite intent not to limit the nation to voluntary enlistments.

In the Constitutional Convention of 1787 restrictions upon the grant of power to raise armies were proposed as amendments and voted down. The first drafts of the Constitution reported by the Committee on Detail empowered Congress "to make war, to raise armies, to build and equip fleets." Supp. to Elliot's Debates, vol. 5, pp. 378, 379, proceedings of August 6, 1787. On August 18 Messrs. Martin and Gerry moved to amend the clause as follows: "*Provided*, That in time of peace the Army shall not consist of more than ——— thousand men." The following proceedings are then reported:

> Gen. Pinckney asked whether no troops were ever to be raised until an attack should be made on us.
>
> Mr. Gerry. If there be no restriction, a few States may establish a military government.
>
> Mr. Williamson reminded him of Mr. Mason's motion for limiting the appropriation of revenue as the best guard in this case.
>
> Mr. Langdon saw no room for Mr. Gerry's distrust of the representatives of the people.
>
> Mr. Dayton. Preparations for war are generally made in peace, and a standing force of

> some sort may, for aught we know, become unavoidable. He should object to no restrictions consistent with these ideas.
>
> The motion of Mr. Martin and Mr. Gerry was disagreed to *nem. con.*
>
> (Farrand's Records of the Federal Convention, vol. 2, p. 323, 330; Supp. to Elliot's Debates, vol. 5, p. 443.)

On September 5, 1787, the limitation which now appears "But no appropriation of money to that use shall be for a longer term than two years," was added. Supp. to Elliot's Debates, vol. 5, pp. 510, 511; Farrand, vol. 2, pp. 505, 509, 570, 595. Mr. Gerry refused to sign the Constitution on September 15, giving as one of his grounds of objection that Congress would have the power to raise armies and money without limit. Elliot, vol. 5, p. 553.

The power to compel military service was even more precisely considered. Virginia and North Carolina and Rhode Island in ratifying the Constitution each submitted amendments to limit the power of Congress to raise armies by draft. Virginia proposed to limit the power over the religious objector. On June 26, 1788, she submitted an amendment for the consideration of the first Congress which should assemble under the Constitution, as follows:

> [19th section of the Bill of Rights.] That any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. (Journals of Congress, vol. 13,

> Appendix, p. 176, Folwell's Press, 1801; 3 Elliot's Debates, p. 659.)

An amendment in the same terms was submitted by North Carolina in ratifying the Constitution, August 1, 1788. Appendix, Journals of Congress, published by Folwell, 1801, vol. 13, p. 184 *et seq.*; 4 Elliot's Debates, pp. 242, 244, 251, 252.

Rhode Island was more ambitious. On May 29, 1790, the Rhode Island convention proposed an amendment in terms substantially similar to those proposed by plaintiffs in error:

> That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, or any law made under the Constitution, to the contrary notwithstanding. (1 Elliot's Debates, p. 336.)

The rejection of the many limitations proposed shows not only that the language employed in the Constitution was definitely intended by the Constitution makers to include the power to draft but also that this was the contemporary interpretation.

(d) The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.

Under the Articles of Confederation the Continental Congress was authorized "to agree upon the number of land forces and to make requisitions upon each State for its quota." The States were to appoint the regimental officers, raise the men, and clothe, arm,

and equip them in a soldier-like manner. Articles 7, 9. 1 Stat. 6, 7. No power over the individual citizens of the State was granted. The Congress had no means of enforcing its requisitions upon the States. 1 Stat. 6, 7. As a result the States responded to the calls of Congress as their own particular necessities dictated. The defect was the occasion of many expressions of anguish by the Commander-in-Chief. Sparks, Writings of Washington, vol. 7, pp. 442, 444. On August 20, 1780, in a letter to the President of Congress, Washington wrote with reference to a plan for providing soldiers:

> The plan for this purpose ought to be of general operation, and such as will execute itself. Experience has shown, that a peremptory draft will be the only effectual one. If a draft for the war or for three years can be effected, it ought to be made on every account. (7 Sparks, Writings of Washington, p. 162.)
>
> It is a thing, that has been all along ardently desired by the army, that every matter which relates to it should be under the immediate direction of Congress. The contrary has been productive of innumerable inconveniences. (7 Sparks, *supra*, 167.)

See also Upton, Military Policy of the United States, pp. 10, 13, 23, 42, 54. The situation during the revolutionary period is described in the Federalist No. 22, p. 143, as follows:

> The power of raising armies, by the most obvious construction of the articles of the Confederation, is merely a power of making

> requisitions upon the States for quotas of men. This practice in the course of the late war, was found replete with obstructions to a vigorous and to an economical system of defense. It gave birth to a competition between the States which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size. The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment, and disinclined them from engaging for any considerable periods. Hence, slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure.

All these things were fresh in the minds of everyone. The first concern was to prevent their repetition.

Madison, in the forty-first number of the Federalist, wrote as follows (p. 276):

> With what color of propriety could the force necessary for defense be limited by those who can not limit the force of offense? If a federal constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the dis-

cretion of its own government and set bounds to the exertions for its own safety.

Hamilton also treated of the matter in the Federalist, especially in Nos. 22–25. In the twenty-third number he wrote (p. 152):

> The authorities essential to the care of the common defense are these; to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. *These powers ought to exist without limitation*, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * *
>
> (p. 153) And it less is can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the national forces.
>
> Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of

it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system: that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the states in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues

> which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

(c) Our national history demonstrates the existence of the power by its exercise.

The history of the Nation is appealed to by the plaintiffs in error as showing the lack of power to compel military service. Briefs, Nos. 663 to 666, pp. 10, 12, 36. The appeal is vain, for while, fortunately, occasions for the draft have been infrequent, it has been resorted to without flinching when the emergency arose.

It was largely by means of forced drafts that the War of Independence was successfully concluded. See Appendices "A" and "B," pp. 123, 131. Near the conclusion of the War of 1812 it seemed that a general draft to recruit the national forces would again be necessary. James Monroe, then Secretary of War, submitted a draft bill to Congress with an argument in its favor so unanswerable that it might well be adopted as the Government's argument on the present hearing. It is printed herewith as Appendix "D," p. 135.

During the Civil War the draft was resorted to upon both sides. President Lincoln declared his view of the matter in no uncertain terms. Said he:

> The principle of draft, which simply is involuntary or enforced service, is not new. It has been practiced in all the ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies,

> at the time they placed in that instrument the provision that "the Congress shall have power to raise and support armies." It had been used just before in establishing our independence, and it was also used under the Constitution in 1812. Wherein is the peculiar hardship now? Shall we shrink from the necessary means to maintain our free Government, which our grandfathers employed to establish it, and our own fathers have already employed once to maintain it? Are we degenerate? Has the manhood of our race run out? * * *
>
> With these views and on these principles I feel bound to tell you it is my purpose to see the draft law faithfully executed. (Excerpt from President Lincoln's unpublished address, Senate Report No. 22, 65th Cong., 1st sess., 55 Cong. Rec. 923, 924, 925.)

Revised Statutes, section 1998, carried forward from 1865 and amended by act of August 22, 1912, c. 336, 37 Stat. 356, provides for loss of citizenship by anyone "who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service."

Statutes providing for compulsory militia service have been in force from the beginning. See statutes in 17th and 18th centuries, Appendix "A," *infra*, p. 123. Similar present-day militia statutes of various States and Territories are collected in Appendix "C," *infra*, p. 133.

The more important Congressional acts providing for drafting the militia are: Act of Feb. 28, 1795, c. 36, 1 Stat. 424, amended by act of April 18, 1814, c. 82, 3 Stat. 134 (see *Houston* v. *Moore*, 5 Wheat. 1, and *Martin* v. *Mott*, 12 Wheat. 19); and act of July 17, 1862, c. 201, 12 Stat. 597.

(f) The decisions of the courts uniformly recognize the power of the Government to compel military service.

Some *dicta* there are which, by reason of the facility with which they adduce illustrations as facts universally acknowledged, acquire the force of adjudicated cases. Of such character are the repeated passages in the opinions of this court recognizing the power of the Government to draft.

In *Tarble's* case, 13 Wall. 397, 408, holding that the State court has no jurisdiction to release an enlisted man in the hands of Federal officers, Mr. Justice Field said (p. 408):

> Among the powers assigned to the National government is the power "to raise and support armies" and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, *whether by voluntary enlistment or forced draft*, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be

> assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

In *Grimley's* case, 137 U. S. 147, 153, involving the validity of an enlistment of a soldier over age, Mr. Justice Brewer said:

> The Government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all.

See also *Presser* v. *Illinois*, 116 U. S. 252, 265; *Robertson* v. *Baldwin*, 165 U. S. 275, 282, *infra*, p. 65; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, *infra*, p. 81; *Butler* v. *Perry*, 240 U. S. 328, 332, 333, *infra*, p. 64.

The Conscription Act of 1863 was held a valid exercise of the power to raise armies. *Kneedler* v. *Lane*, 45 Pa. St. 238; act of March 3, 1863, c. 75, 12 Stat. 731, amended by act of February 24, 1864, c. 13, 13 Stat. 6; act of July 4, 1864, c. 237, 13 Stat. 379; act of March 3, 1865, c. 79, 13 Stat. 487. In *United States* v. *Scott*, 3 Wall. 642, and *United States* v. *Murphy*, 3 Wall. 649, this court, in answering questions certified, construed the act of 1863, and the

amendatory act of 1864, no question of constitutionality being raised.

The validity of the draft acts of the Confederate States during the Civil War was vigorously attacked in the Confederate courts. The pertinent clauses of the constitution of the Confederate States were in precisely the same terms as the similar clauses in the Constitution of the United States. The statutes were sustained as a means of carrying into effect the power "to raise and support armies." *Burroughs* v. *Peyton*, 16 Gratt. 470; *Ex parte Coupland*, 26 Tex. 386; *Jeffers* v. *Fair*, 33 Ga. 347; *Barber* v. *Irwin*, 34 Ga. 27; *Gatlin* v. *Walton*, 60 N. C. 333, 408; *Ex parte Hill*, 38 Ala. 429; *Ex parte Stringer*, 38 Ala. 457; *Parker* v. *Kaughman*, 34 Ga. 136; *Daly & Fitzgerald* v. *Harris*, 33 Ga. Supp. 38, 54; *Simmons* v. *Miller*, 40 Miss. 19; *Ex parte Bolling*, 39 Ala. 609; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459.

Compulsory militia service has also been enforced by the courts. In *Houston* v. *Moore*, 5 Wheat. 1, and *Martin* v. *Mott*, 12 Wheat. 19, court-martial sentences were sustained against militiamen who failed to respond to the Federal call during the War of 1812. The act of Congress of July 17, 1862, c. 201, 12 Stat. 597, requiring performance of militia duty, was sustained in *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225; *In re Griner*, 16 Wis. 423; *Druecker* v. *Salomon*, 21 Wis. 621; *In re Spangler*, 11 Mich. 298; *Allen* v. *Colby*, 47 N. H. 544. As to the power of the State to draft see also *Lanahan* v. *Birge*, 30 Conn. 438, 443; *People ex rel. German Ins.*

Co. v. *Williams*, 145 Ill. 573, 583; *In re Dassler*, 35 Kans. 678, 684; *State* v. *Wheeler*, 141 N. Car. 773, 777.

The present Selective Draft Act has been sustained in every case which has come before the courts. Cases in the Federal courts in addition to those now on hearing are *United States* v. *Sugar* (D. C.), 243 Fed. 423; *Angelus* v. *Sullivan* (C. C. A. 2d C.; not reported); *United States* v. *Stephens* (D. C. Del.; not reported); *Ex parte Hackenberg* (D. C. Nor. Ohio; not reported). *United States* v. *Yanyar* (D. C. R. I.; not reported); *United States* v. *Cattell & Phillips* (D. C. S. D. N. Y.; not reported). See also *Claudius* v. *Davie*, 174 Cal. —, 165 Pac. 689.

(g) There is not, as asserted, any common-law right of a soldier not to be sent out of the country.

The fifth assignment of error in the *Jones* case, No. 738, complains of error "in holding that appellant, contrary to his common-law rights as a citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States" (brief, p. 6).

Counsel in the *Minnesota* cases, Nos. 663–666, discuss the military obligations of Englishmen (brief, p. 8 *et seq.*). So far as the asserted rights of State militiamen are concerned, discussion is postponed (*infra*, p. 46 *et seq.*).

The status of a citizen properly drafted into the land forces of the United States is that of a soldier no less than the status of one who has voluntarily enlisted. Both must obey the commands of their

superiors. The willingness with which one has become a soldier affords no ground for distinction. Every citizen impliedly consents to become a soldier in case of need. The soldier who, having become such involuntarily, disobeys an order to go to the place where the enemy is to be met is no less a deserter than a volunteer who does the same.

Again, the testimony of history is conclusive. Our armies have served in all parts of the world. The flag has waved over the national forces at Tripoli (Treaty of Peace with Tripoli, 1805, Art. III, 2 Malloy's Treaties, p. 1789); and at Tampico (*Fleming* v. *Page*, 9 How. 603); in Mexico, in China, and in Canada. Our legions have been victorious on the soil of Cuba, Porto Rico and the Philippines, in the Caribbean and across the Pacific.

Such foreign service has never been regarded as illegal. Indeed this court has spoken to the contrary in *Fleming* v. *Page*, 9 How. 603, involving a question as to duties on goods imported from Tampico, Mexico, while that city was occupied by our troops. Mr. Chief Justice Taney said (p. 615):

> As commander-in-chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. * * * The power of the President under which Tampico and the State of

> Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government.

In the Treaty of Alliance of 1778 with France, in force when the Constitution was adopted, the aid of the United States to France was pledged if war should break out between France and Great Britain (Art. I); conquest of Canada and the Islands of Bermudas by the United States was contemplated (Art. V). 1 Malloy's Treaties, pp. 479–481.

Prior to the adoption of the Constitution in 1787 the militia statutes passed by the Original States frequently provided that the militia forces might be sent into neighboring States. See the following: Maryland, acts of 1778, October, c. 10; Connecticut, Laws 1784, p. 147; Rhode Island, act of December, 1777, pp. 10, 11; New York, April 3, 1778, c. 33; Laws 1777–1784, vol. 1, p. 68; act October 9, 1779, c. 13; Laws, *supra*, p. 159; act of April 4, 1782, 5th sess., c. 27; Laws, *supra*, p. 444, sec. 17; p. 446, sec. 20; Massachusetts Resolves, June, 12, c. 51, 1778, p. 18; Massachusetts Laws, May, 1776, c. 21, p. 89; Laws and Resolves, 1780–1, p. 680, c. 99; Resolve, June 28, 1781; New Hampshire, act March 18, 1780, c. 12, Metcalf's ed., vol. 4, p. 273; North Carolina, November, 1777, c. 19, vol. 24, State Records 128, 1778, 3d sess., c. 1, *id.*, p. 198, May, 1779, c. 1, vol. 24, State Records 254; New Jersey, act September 27, 1777, c. 44, sec. 5, Laws September, 1777, p. 99;

South Carolina, act February 13, 1779, No. 1116. 4 St. L. 465; act February 26, 1782, No. 1154, 9 St. L. p. 682; Pennsylvania, act March 20, 1780, c. 152, 10 St. L., 144, 156. If the contention of counsel be correct, such statutes of the still independent and nonunited States invaded the common-law rights which their citizens had enjoyed as colonists.

Counsel in the *Jones* case, No. 738, speak of "natural rights" (brief, p. 9). There is no natural right to disobey a valid legislative enactment. The notion, moreover, that compulsory military service is contrary to the spirit of democratic institutions (brief, No. 663, pp. 11, 12) is unfounded in fact. Our Constitution implies equitable distribution of the burdens no less than of the privileges of citizenship.

In a matter so fully covered by American precedent there is little need to invoke the history of England. But if it be material, it is easy to show that English history itself does not support, as counsel seem to think, the alleged right to be free from conscription for foreign service. The recent acts in England and Canada, *supra*, p. 16, indicate the parliamentary view that the voluntary recruiting system was followed for many years only as a matter of policy. See May's Constitutional History of England, vol. 2, pp. 136–138; vol. 3, pp. 280–283.

The military obligation of Englishmen in the days prior to the Revolutionary War is uncertain in extent. The militia existed prior to the Norman Conquest. Blackst. Comm., vol. 1, *p. 409. Thereafter

the militia obligation was not forgotten (see Assize of Arms A. D. 1181; Stubbs, Select Charters, 8th ed., p. 153; Adams and Stephens, Documents of Constitutional History, p. 23; Stubbs, Constitutional History, Clarendon Press, 2d ed., vol. 1, p. 591; Statute of Winchester A. D. 1285, 13 Edward I, c. 6, 1 Stat. L. England, p. 234); also the feudal obligation of knights was enforced (Blackst. Comm., vol. 1, *p. 410); as well as the subject's obligation of allegiance. The feudal obligation apparently was not merged in the obligation to bear arms. Pollock and Maitland "History of English Law," vol. 1, p. 234.

Various phases of the military obligation gave rise to struggle between the Crown and the representatives of the people. The contest of the Crown for the right to keep a standing army in time of peace without the consent of Parliament was settled by the Bill of Rights of 1688. 1 William and Mary, sess. 2, c. 2, sec. 1; 9 Stat. L. 67. Anciently there can be no doubt that the king exercised the prerogative of impressment—that is, an arbitrary selection of individual free men, to serve in the army. Barrington, Observations on Ancient Statutes, p. 334; Stubbs, Constitutional History of England, vol. 2, pp. 284, 540. Falstaff, apologizing for the cadaverous individuals whom he had gathered under his commission of array, said: "I have misused the king's press damnably." King Henry IV, part 1, act 4, scene 2.

The barons at one time disputed the right of the Crown to compel foreign service under the feudal obli-

gation; but as to the extent of the obligation of knight service, Pollock and Maitland say: "It is a question, we may say, which never receives any legal answer." 1 History of English Law, 232. When the knights did not furnish a sufficient force Stubbs states "recourse was had to the native population. Every free man was sworn under the injunction of the Conqueror to join in the defense of the king, his lands and his honour, within England and without." 1 Stubbs, Constitutional History of England, Clarendon Press, 2d ed., p. 33; under Henry III (2 Stubbs, *supra*, p. 280).

Commissions of array were developed under Edward I.

> In 1282, on the 30th of July, he commissioned William le Butiller of Warrington to 'elect,' that is, to press or pick a thousand men in Lancashire. (Stubbs, vol. 2, p. 284.)

Edward II threw the expense of additional armies on the townships and counties.

> Edward I moreover had always paid the wages of his forced levies; under Edward II the counties and even the townships were called upon to pay them; they were required to provide arms not prescribed by the statute of Winchester, to pay the wages of the men outside of their own area, and even outside of the kingdom itself. (Stubbs, vol. 2, p. 540.)

A petition was presented to Edward III "that the 'gentz de commune' might not be distrained to arm themselves at their own cost contrary to the statute of Winchester, or to serve beyond the limits of their

counties except at the king's cost." 2 Stubbs, p. 542. The statutes which resulted from the petitions are gathered in an appendix (Appendix "E").

But though the statutes come to prohibit the Crown from impressing soldiers without "the common consent and grant made in Parliament," and provide at a later day (1661) that subjects of the realm shall not be compelled to march out of the kingdom otherwise than by the laws of England ought to be done, 13 Car II, c. 6, 5 Stat. R. 308; 13 and 14 Car II, c. 3, 5 Stat. R. 358 (1662), nothing has been found which limits the *power* of *Parliament* to compel foreign military service. The obligation of every "lovinge and obedient subject" "accordinge to their bounden dutyes" to serve and assist his prince and sovereign "within this Realme and without this Realme" was expressly recognized in 1494 by act 11 Henry VII, c. 18, 4 Stat. L. England, p. 66; and in 1503, 19 Henry VII, 4 Stat. L. England, p. 82; 3 Henry VIII, c. 5, 4 Stat. L. England 111 (A. D. 1511, 1512); 2 and 3 Edward VI, c. 2, A. D. 1548, 4 Stat. Realm 39; see 4 and 5 Philip and Mary, c. 3, 4 Stat. R. 320 (1557). In 1592 Parliament levied a tax on the parishes for the Relief of Souldiers, 35 Eliz. c IV, 4 Stat. Realm, pt. 2, p. 847. The act provided "That everie Souldier or Marriner * * * or such as shall hereafter return into this Realm hurte or maymed or grevouslie sicke, shall repaire * * * to the Treasourers of the Countie out of which he was pressed, or if he be no prest man. * * *" Parliament itself provided for impressment of vagrants to serve in the army in

1703, 2 and 3 Anne, c. 13, 8 Stat. R. 275; 4 Anne, c. 10, 8 Stat. R. 356 (1704); 4 and 5 Anne, c. 21, 8 Stat. R. 503 (1705); 7 Anne, c. 2, 9 Stat. R. 40 (1708); 29 George II, c. 4, 21 Stat. L. 318 (1756); 30 George II, c. 8, 22 Stat. L. 10 (1757); 18 George III, c. 53, 32 Stat. L. 117 (1778); 19 George III, c. 10, 32 Stat. L. 183 (1779). These latter statutes it is true applied only to a certain class of citizens. But if Parliament had power to draft one class, an increased military necessity would warrant the impressment of others. In 1640 Parliament enacted that the Justices of the Peace should "impresse * * * persons as shall be fit and necessary." 16 Car 1, c. 28, 5 Stat. Realm 138, Appendix "E," *infra*, p. 138.

Blackstone mentions among the rights of Englishmen the right not to be banished, making it clear, however, that military service in foreign parts is not within the term (vol. 1, pp. *137, 138). He said:

> The law is in this respect so benignly and liberally construed for the benefit of the subject that though *within* the realm the King may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception. He cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than an honorable exile.

The power to impress seamen to serve in the Navy was thoroughly established. See *King* v. *Douglass*, 5 East 477 (1804); *Ex parte Fox*, 5 Term Rep. 276; *Barrows Case*, 14 East 346; *King* v. *Young*, 9 East 466; *Reg.* v. *Broadfoot*, Foster's Crown Cases (1809), p. 154. Barrington's Observations on Ancient Statutes, p. 334. In *Rex* v. *Tubbs*, 2 Cowp. 517 (1776), Lord Mansfield said that this power was based upon immemorial custom. See Cooley on Constitutional Limitations, 6th ed., p. 363.

II.

THE SELECTIVE DRAFT LAW INFRINGES NO PROVISION OF THE CONSTITUTION CONCERNING THE MILITIA.

The militia is mentioned in five provisions of the Constitution, as follows:

> Art. I, sec. 8. The Congress shall have power * * *
>
> (Cl.) 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
>
> (Cl.) 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.
>
> Art. II, sec. 2. 1. The President shall be Commander in chief of the Army and Navy of

> the United States, and of the militia of the several States, when called into the actual service of the United States * * *.
>
> Amendment II. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.
>
> Amendment V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *.

Plaintiffs in error submit various and contradictory contentions based on the clauses quoted. Summarized, the argument runs as follows: Plaintiffs in error, although not in the organized, are members of the unorganized militia, therefore they may be called only as militiamen and for militia duty. Constitution, Art. I, sec. 8, cl. 15. If militiamen of the States may be placed in the National Army, rights reserved to the States to maintain the militia, appoint the officers, and train the local forces in accordance with the discipline prescribed by Congress, are infringed Amendment X; Art. I, sec. 8, cl. 16; briefs in Nos. 663–666, pp. 16, 18; brief in No. 656, pp. 30, 32; R. No. 680, p. 271; R. No. 681, pp. 7, 25; brief No. 702, p. 78.

Furthermore, they may be called as militiamen only for three purposes: To execute the laws of the United States, to suppress insurrections, and to repel inva-

sions. Specifically, they can not be sent out of the country. The Selective Draft Law calls the militia for purposes unauthorized by the Constitution. Briefs in Nos. 663–666, pp. 18, 19.

I. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.

(a) The power granted to Congress over the militia of the States, Constitution, Art. I, sec. 8, cl. 15, 16, is not in limitation but in extension of the power to raise an army, cl. 12.

The clauses of Article I, section 8, of the Constitution constitute a charter of the powers conferred upon the National legislature. Each grant is distinct from and additional to the others. Congress may raise an army. It may also provide for calling forth the militia. There can be no ambiguity here.

The two powers are not inconsistent with each other, but are complementary. The army is a national organization whose business is war. The militia is a State institution, *infra*, p. 46, composed of the able-bodied citizenry, who devote practically their entire time to ordinary civilian pursuits. The Army is for use in a national crisis, trained and disciplined for service against hostile power until the war is concluded. The militia is to enforce the *posse comitatus*, primarily for use in time of local disturbance, and for a period of only a few months. Upon the State devolves the duty to maintain and train the militia. The State is expressly prohibited from establishing an army. Constitution, Art. I, sec. 10.

The complementary character of the two distinct powers is seen from the reasons for investing Congress with them. It was desired not to limit the power of the National Government over the army, but to make its existence subject to the control of the representatives of the people by restricting appropriations for only two years' use and to limit the occasions requiring the maintenance of an army in time of peace. Opposition from the descendants of Englishmen who had not forgotten the armies maintained by the Stuart kings in time of peace greeted the proposal to vest the National Government with power over "the bulwark of the citizen's liberties." 3 Elliot's Debates, 381; Farrand's Records of the Federal Convention, vol. 3, p. 207, 209. The answer was obvious that the Constitution did not provide for uncontrolled power of the Executive, and that there was no more ground to fear abuse of the power by representatives of the people in national assembly than in the local legislatures. Federalist, No. 25, p. 164. Given the power to call the militia of the States for local disturbances, the necessity for the maintenance by the National Government of a large standing army in time of peace is obviated. Supp. to Elliot's Debates, 466, 467. Given also the power to maintain armies, the National Government is not always under the necessity of calling upon citizens to leave their customary occupations, involving loss of time and labor and the expense incident to frequent rotation of militia service. Again, it was clear that untrained militia forces, though courageous, may in emergency not be sufficient

to cope with hostile disciplined troops. Federalist, Nos. 24, 25; Upton, "Military Policy of the United States," pp. 13, 15, 45, 101; see *McClaughry* v. *Deming*, 186 U. S. 49, 57.

The history of the times (*supra*, p. 24) reinforces the plain language of the Constitution that the insertion in that instrument of power to use the militia was not intended to abrogate the power to raise armies. The proportion of each organization and the means for raising both are for Congress to determine. See Federalist Nos. 22 to 29; *Burroughs* v. *Peyton*, 16 Gratt. 470, 482.

(b) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.

It is contended that the militia is an institution of the States; that if the Federal Government may make wholesale draft upon militiamen the State institution may be wiped out.

There is no doubt that the militia recognized in the Constitution is a State institution. This is shown not only by the reserved authority over it when not employed in the service of the United States (Art. I, sec. 8, cl. 16), but by the express language in Article II, section 2, clause 1, as follows:

> The President shall be Commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

Prior to the adoption of the Constitution each of the States maintained its own militia. The States

have legislated concerning the militia establishment and organization since the beginning of the Government. It is thoroughly settled that such regulations, in the absence of congressional regulation to the contrary, are valid. *Presser* v. *Illinois*, 116 U. S. 252; *People ex rel.* v. *Hill*, 126 N. Y. 497, 503, 504; *Lanahan* v. *Birge*, 30 Conn. 438; *Dunne* v. *People*, 94 Ill. 120. In *Houston* v. *Moore*, 5 Wheat. 1, a conviction under a Pennsylvania statute of a militiaman who failed to respond at the point of rendezvous upon call into the service of the United States was held valid. Until he reported at the rendezvous the militiaman was regarded as in the control of the State (see pp. 21, 51). When the militia of the States is called out the militiamen as individuals are not directly addressed, but the call may be directed to the governor of the State or subordinate commanding officers of the militia (5 Wheat. 15; see act May 27, 1908, c. 204, 35 Stat. 399).

The argument from State sovereignty, however, goes too far. If its validity is admitted the grant of power to Congress "to raise armies" is practically nullified. It may be that an effective army can not be raised by voluntary enlistment. Power to make war and raise armies is a power to command, not to contract. If dependent on consent of individuals it is no power at all.

If the National Government can not draft citizens of the United States, who are also citizens and militiamen of the States, by the same token it is denied the power to accept volunteers who are State militia-

men. For if the entire State militia may be drafted, so also may the entire State militia voluntarily enlist. A private citizen can not, of course, grant away the sovereignty of the State. It may be said that the entire State militia would not voluntarily enlist. But if drafting part of the State militia is to be held invalid because later the whole may be drafted, by parity of reasoning voluntary enlistment of part is unconstitutional. *Ex parte Coupland*, 26 Tex. 386, 396; *Burroughs* v. *Peyton*, 16 Gratt. 470, 482. The ranks of the National Army must then be reduced to boys under 18, men over 45, and foreigners.

In the cases in the courts of the Confederate States during the Civil War which sustained the power of the Confederate Congress to conscript citizens of the Southern States, the point was insisted upon by members of the States' militia that the States' rights were being infringed. The contention was in each case denied. *Ex parte Coupland*, 26 Tex. 386, 396, 402; *Burroughs* v. *Peyton*, 16 Gratt. 470, 475, 483, 484, 485; *Jeffers* v. *Fair*, 33 Ga. 347, 351, 353; *Ex parte Tate*, 39 Ala. 254, 268; *Barber* v. *Irwin*, 34 Ga. 27, 37.

In *Simmons* v. *Miller*, 40 Miss. 19, 26, it was pointed out that if the national power over the citizens is subservient to the State's rights over militia, then the National Government is in the helpless condition of the Confederation, which it was one of the prime objects of the Constitution of the United States of 1787 to avoid.

In *Jeffers* v. *Fair*, 33 Ga. 347, the court, in disposing of the contention that to allow the National

Government to draft the militia interferes with the right of the States to appoint officers thereof, said (p. 353):

> The simple and obvious reply is that the status of the citizen is not merged in the militiaman; that the fact of enrolment with the militia does not exempt him from other duties and liabilities of citizenship.

In *Ex parte Bolling*, 39 Alabama 609, the Supreme Court of Alabama disposed of the contention as follows (p. 610):

> We have heretofore held, that the conscript laws are constitutional, (*Ex parte Hill*, 38 Ala. 428,) and we have also ruled, that when the lawful call of each government, Confederate and State, to perform military service, falls on the same person, the claim and call of the Confederate States must prevail over the claim and call of the State government, on the ground that the constitution of the Confederate States, and the laws made in pursuance thereof, are the supreme law of the land.

The same view of the contention was taken by the Supreme Court of Pennsylvania in a case arising under the Conscription Law of Congress of 1863, in *Kneedler* v. *Lane*, *supra*, 45 Pa. St. 238, 282, 322.

If there be conflict, therefore, between the State's rights over the militia and the national power to raise an army, the national power must prevail.

But there is no conflict in fact. Throughout our history the National Government has not impaired the right of the State to keep up its own militia.

Under the present Selective Draft Law only an inconsiderable portion of the militia of the States as a whole are drawn into the National forces. The citizens of the States are withdrawn from possible call for State militia service only temporarily, during the period of the existing emergency. Act of June 15, 1917, Pub. No. 23, 65th Cong., sec. 4, p. 41. The purpose of their withdrawal is in defense of all of the States.

The right of the States to organize and train the militia remaining has been recognized and safeguarded by the National Government. Act of June 14, 1917, Pub. No. 22, 65th Cong.; National Defense Act of June 3, 1916, 39 stat. 166, 198, sec. 61. The act of June 14, 1917, entitled "An act to authorize the issue to States and Territories and the District of Columbia of rifles and other property for the equipment of organizations of home guards," authorizes the Secretary of War during the existence of the emergency to issue to the several States

> for the equipment of such home guards of the character of State police or constabulary as may be organized by the several States and Territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several States and Territories and the Commissioners of the District of Columbia or other State troops or militia * * * rifles [and other equipment as] shall be receipted for by the governors of the States and Territories * * * *Provided*, That all home

> guards, State troops and militia receiving arms and equipments, as herein provided, shall have the use, in the discretion of the Secretary of War, and under such regulations as he may prescribe, of rifle ranges owned or controlled by the United States of America.

The home guards or militia here referred to are of the character of local organizations mentioned in section 61 of the National Defense Act of June 3, 1916, which provides:

> That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace: *Provided further*, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary.

Far from attempting to interfere with the right of the States to organize, train, and call citizens for local militia service, these acts expressly provide for aiding the States therein by lending rifles and other equipment.

Already statutes have been passed in many States providing for calling out members of the unorganized militia for State service when the members of the National Guard are in the forces of the United States.[1]

[1] Georgia, Laws 1916, pp. 158, 160, 161, secs. 2, 9, 10, 11.
Illinois, Laws 1917, act June 25, 1917, secs. 1, 2, pp. 782, 783.
Louisiana, Laws 1915–16, No. 264, secs. 5, 9, 70, pp. 540, 542, 548.
Maine, R. S. 1916, c. 15, secs. 9, 10, pp. 296, 298, 299.

2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the Draft Law is not that of militiamen but of citizens.

(a) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.

The Selective Draft Law is entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States." It provides in section 1 for, first, increasing the increments of the Regular Army; second, for drafting those persons then serving as members of the National Guard; and, third, for drafting an additional force of 500,000 enlisted men. The Regular Army is being recruited by voluntary enlistment. Plaintiffs in error do not claim to be members of the National Guard. Hence their objection must be to the third method of increasing the Military Establishment—the draft. The draft is not based upon the liability to perform militia duty. On the contrary, section 2 provides:

> Such draft as herein provided shall be based upon liability to military service of all

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Maryland, Laws 1917, act June 17, 1917, ex. sess., c. 26, sec. 91, p. 62.

New Hampshire, Pub. Acts and J. Res. 1917, c. 123, sec. 4, p. 52; c. 144, p. 64; c. 197, p. 98.

New York, Laws 1916, vol. 3, c. 568, p. 1862, sec. 9.

North Carolina, Pub. Laws 1917, c. 200, secs. 10, 47, pp. 352, 353,, 360-361.

Oregon, Gen. Laws 1917, c. 327, secs. 3, 4, 11, 13, pp. 655, 657.

Washington, Laws 1917, c. 107, sec. 1, 9, pp. 361, 364, 365.

> male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive.

While the act calls for men only between the ages of 21 and 31, the militia of the various States comprises men between the ages of 18 and 45. National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 197, sec. 57. There are certain well-known methods of calling out the State militia into the service of the United States. In the statutes under which Congress has in the past made provision for calling the militia the words are addressed expressly to the militia.[1]

Counsel in cases Nos. 680, 681, 709, admit "that the law does not call the militia" (R. No. 681, p. 35; No. 680, p. 271). In the *Kramer* case counsel

[1] Congressional statutes authorizing the President to call out the militia of the States:

Act Sept. 29, 1789, c. 25, 1 Stat. 95, 96.
Act Apr. 30, 1790, c. 10, 1 Stat. 119, 121, sec. 16.
Act May 2, 1792, c. 28, 1 Stat. 264.
Act May 9, 1794, c. 27, 1 Stat. 367.
Act Nov. 29, 1794, c. 1, 1 Stat. 403.
Act Feb. 28, 1795, c. 36, 1 Stat. 424.
Act June 24, 1797, c. 4, 1 Stat. 522.
Act Mar. 3, 1803, c. 32, 2 Stat. 241.
Act Apr. 18, 1806, c. 32, 2 Stat. 383.
Act Mar. 30, 1808, c. 39, 2 Stat. 478, 479.
Act Apr. 10, 1812, c. 55, 2 Stat. 705, 706.
Act May 13, 1846, c. 16, 9 Stat. 9.
Act July 29, 1861, c. 25, 12 Stat. 281.
Act July 17, 1862, c. 201, 12 Stat. 597, sec. 1.
Act Jan. 21, 1903, c. 196, 32 Stat. 775, 776, sec. 4.
Act May 27, 1908, c. 204, 35 Stat. 399, 400, sec. 3.

stated in the court below "that the conscription law calls, therefore, for the men of the State into the service of the United States, but it does not call on the Governor to provide militia" (R. No. 680, p. 10).

It is argued that since section 57 of the National Defense Act of 1916 designates all able-bodied male citizens between the ages of 18 and 45 as militiamen the Selective Draft Law is a call upon militiamen for militia service. The section referred to provides:

> The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

In thus treating of the men liable to call for militia service Congress clearly did not intend to relinquish its power to call citizens for service in the National Army. As section 57 states, men between 18 and 45 are liable to militia duty. The Selective Draft Law provides that men between 21 and 30 are subject to military service in the National Army. Section 57 of the act of 1916 throws no light on the subsequent statute.

(b) Members of the National Guard are called not as militiamen but as citizens of the United States.

It may be urged that although the increase in the Regular Army recruits and the additional force of 500,000 drafted men provided by the Selective Draft Law are not called as militia, the National Guard was the Organized Militia of the States and was called out as such. This also is incorrect.

Section 1 of the act provides:

> That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—
>
> * * * * *
>
> Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

The authority is not to call into service militia organizations. It is to call any of the members of the militia. Authority extends to drafting any or all of

such members. "Said members so drafted * * * shall serve." Again, the members drafted are to be organized and officered. National Guard organizations are already organized and officered. Furthermore, the draft is specified to be in accordance with section 111 of the National Defense Act of 1916, which provides that "persons so drafted, shall from the date of their draft, stand discharged from the militia." This section reads as follows:

> When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, * * * draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.

Section 101 of the National Defense Act of 1916, 39 Stat. 208, on the other hand, makes express provision for calling the National Guard as State militia. This section provides:

> The National Guard when called *as such* into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Italics ours.)

It is true that section 1, paragraph 2, of the Selective Draft Law, *supra*, contains a proviso which refers to organizations or units of the National Guard. The proviso, however, does not change the effect of the purview of the paragraph. The clause "when so drafted" refers to the preceding words "any or all members." It does not qualify the subsequent words "organizations or units of the National Guard." The law provides that when any or all members of the National Guard are drafted they shall be embodied into organizations, and any force of training cadres may be transferred to any other force (sec. 2). Section 2 further provides:

> Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

The same injunction is contained in section 7:

> *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall so far as practicable be grouped into units by States and political subdivisions of the same.

The three provisos are *in pari materia*. Members of the National Guard may be drafted. When detached they are to be embodied into organizations of men from the same locality, being grouped together. The organization so made up according to section 1, paragraph 2, now under consideration, shall, "so far as practicable, retain the State designations of their respective organizations." This proviso patently deals with nomenclature. The organizations spoken of are not the old organizations of the National Guard but the new units embodying any or all National Guard members and others transferred. The qualifying clause "so far as practicable" indicates that this is the proper construction of the proviso.

In *United States* v. *Sugar*, 243 Fed. 423, the district court in disposing of a similar contention said (p. 439):

> If the federal government has, as there can be no doubt that it has, the power to draft into the military service of the United States any of its citizens, surely it has power to draft such citizens, notwithstanding the fact that they may previously have been members of the National Guard. Otherwise, it would be in the power of any state or of its citizens to easily evade or nullify any attempt of the

federal government to exercise this power and such power might be wholly nugatory.

As to the power to select from the body of the citizenship those who are members of the National Guard, there can be little doubt. Such a selection is not arbitrary. Having been trained to military service, it is both reasonable and prudent to choose them among the first in increasing the Military Establishment. In an able article in 30 Harv. Law Rev., 712, Maj. S. T. Ansell (now Brigadier General and Acting Judge Advocate General) states (p. 715):

> Throughout our history the States have recognized the feasibility of parting with their organized militia when a national crisis has demanded it. In the Civil War the States reported first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the Confederacy during that period. In the War with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the National allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The article concludes with the following adequate language (p. 723):

> A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or re-

> serve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Of course, in a strict sense, none of the present plaintiffs in error is entitled to raise these objections. No one of them is affected by the constitutional point presented. None of the plaintiffs in error is a National Guardsman. Persons drafted in the army of 500,000 are not entitled to present the rights of National Guardsmen.[1] Even in the conspiracy cases, Nos. 680, 681, 702, the point is improperly raised, because the conspiracy charged was to violate those provisions of the draft law dealing with enrollment. The provision as to National Guard is separable. See *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

3. Assuming arguendo that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.

We assume for the purpose of argument, wholly contrary to the facts, that the national authorities

[1] In case the question were properly raised by a National Guardsman, the further consideration may be presented that under the terms of his oath, secs. 70, 71, by which he agrees to obey the orders of the President, to serve under conditions prescribed by law, and to defend the United States against all enemies whomsoever, he has expressly waived his alleged right as militiaman to remain in the country.

have called out the Organized Militia of the States and that plaintiffs in error as members thereof have been ordered to respond. They assert that there is no need for a militia force to execute the laws of the Union, suppress insurrection or repel invasion, and that they can neither be sent abroad nor ordered out at all.

It has long been settled, however, under our scheme of constitutional government and the statutes, that the power resides in only one person to decide when the emergency arises which justifies the calling out of the militia: that person is the Commander-in-Chief, the President of the United States. *Martin* v. *Mott*, 12 Wheat. 19, 31, 32; *Luther* v. *Borden*, 7 How. 1, 44. It is not even for the governor of the State, much less a private militiaman, to say that the President has wrongly decided. We recognize the constitutional limits on the power of the President to call out the militia. Attorney General Wickersham advised President Taft in an opinion rendered February 17, 1912, that the militia can not be used as part of the Regular Army in a foreign land in time of peace. 29 Op. Atty. Gen. 322. The legal adviser of the Commander-in-Chief, however, was called upon to consider a different question from that which is presented to the court in these cases. The President, of course, should be scrupulously careful not to exceed the bounds of his constitutional authority. But the matter is solely within his discretion, and from a decision made in exercise thereof no appeal lies to the courts. Corres-

tion for possible abuse is in the power of impeachment and frequent elections.

On the facts in the present cases, moreover, it certainly could not be said that the Commander-in-Chief has exercised his discretion unwisely. A mass of evidence may have persuaded him that the German military authorities had well-matured plans to conquer the armies of our present Allies and then invade our shores in order to compel us to pay the expenses of their adventure of aggrandizement. Evidence to this effect is now not altogether lacking to the public.[1]

In Mr. Wickersham's opinion of February 17, 1912, *supra*, it was said (p. 324):

[1] This seems to have been the opinion of Ambassador Gerard. 55 Cong. Rec., p. 1162.

Admiral Von Goetz, of the German Navy, is reported by Admiral Dewey to have stated during the Spanish-American War as follows:

"About 15 years from now my country will start her great war. She will be in Paris about two months after the commencement of hostilities. Her move on Paris will be but a step to her real object—the crushing of England. * * * Some months after we finish our work in Europe we will take New York, and probably Washington, and hold them for some time. We will put your country in its place, with reference to Germany. We do not propose to take any of your territory (?), but we do intend to take a billion or so of your dollars from New York and other places. The Monroe doctrine will be taken charge of by us, as we will then have to put you in your place, and we will take charge of South America, as far as we wish to. * * * Don't forget this, and about 15 years from now remember it, and it will interest you." (Naval and Military Record, No. 33, Vol. LII, p. 578; see 55 Cong. Rec., 8178.)

> The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose.

The power to repel invasion includes the power to do so effectively. *Martin* v. *Mott*, 12 Wheat. 19, 29. If, in the easily admitted case, the militia may be sent a few miles beyond the boundary lines of the territory of the United States under this power, it may be sent a few thousand miles as the necessary and effective means of repelling a threatened invasion.

III.

THE SELECTIVE DRAFT LAW IMPOSES NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE.

Soon after the law now in question was approved the Supreme Court of California held in *Claudius* v. *Davie*, 165 Pac. 689, that "the claim that the law imposed slavery or involuntary servitude is utterly without merit." This was in a memorandum opinion on an application for a writ of prohibition against a State officer to prevent enforcement of the law. All those courts which have since considered the question (*supra*, p. 34) have expressed the same justifiable impatience with the suggestion.

If the citizen owes a duty to render military service, the Thirteenth Amendment does not interfere with its enforcement. The amendment was the result, not as counsel in the *Arver* case, with some imagination, assert, of the opposition of the people to the draft, but of a desire to banish forever the well-known forms of chattel slavery and the involuntary servitude akin thereto. It was not intended to destroy those powers of government necessary to be exercised to secure citizens the blessings of liberty. The argument of counsel is that the Thirteenth Amendment, designed to make citizens free, should, by denying the power of effective opposition, be molded into an instrument to make them slaves of a foreign power.

No better language can be employed in explaining the relation of the amendment to exceptional duties owed to the State than that of this court in *Butler* v. *Perry*, 240 U. S. 328, holding that a State may compel labor upon the public roads. It was there said (pp. 332, 333):

> Utilizing the language of the Ordinance of 1787, the Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with

> respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy* v. *Ferguson*, 163 U. S. 537, 542; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207; *Bailey* v. *Alabama*, 219 U. S. 219.

In *Robertson* v. *Baldwin*, 165 U. S. 275, the sections of the Revised Statutes providing that justices of the peace might arrest deserting seamen, compelling them in effect to labor in accordance with their shipping articles, were sustained against an attack that they violated the Thirteenth Amendment. This court said (p. 282):

> It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, in which the arrest of a deserting conscript in the Russian navy was held proper as in accordance with the Russian treaty of 1832, no question was raised that the Thirteenth Amendment was in any way violated.

In *Clyatt* v. *United States*, 197 U. S. 207, where peonage was held contrary to the Thirteenth Amendment, this court said (p. 216):

> We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S. 275, or the obligation of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme case.

The records abound with examples of compulsory public service. A public officer can not resign when he will. *Edwards* v. *United States*, 103 U. S. 471. One duly elected may be compelled to serve by mandamus. *People ex rel. German Insurance Co.* v. *Williams*, 145 Ill. 573. Failure in this regard is a criminal offense at common law. See cases cited in *People ex rel.* v. *Williams, supra*, p. 578. Employees in a public service business, by reason of the relation into which they have entered and the peculiar and overwhelming public interest in its continuance at certain times, may be required, for a reasonable period, to continue at their posts. *Wilson* v. *New*, 243 U. S. 332, 351. In the 15th century Englishmen were impressed to build a wall to keep out the sea. Barrington's Observations on Ancient Statutes, 396. South Carolina in 1778 required the inhabitants of the neighborhood to labor in clearing a river. South Carolina Statutes at Large, vol. 7, p. 524. From time immemorial citizens have been compelled

to serve on juries. *In re Appeal of Scranton*, 74 Ill. 161; *Bragg* v. *People*, 78 Ill. 328, 330. They may be required to join the *posse comitatus;* to go to the tax office. Children may be compelled to go to school. *State* v. *Bailey*, 157 Ind. 324. Witnesses may be forced to appear. United States Constitution, Sixth Amendment; *Israel* v. *State*, 8 Ind. 467. Attorneys must defend accused persons without compensation. *Vise* v. *County*, 19 Ill. 78; *Rowe* v. *Yuba County*, 17 Calif. 61. Reports involving labor, little and vast, may be required. Physicians in some States must report births. *Robinson* v. *Hamilton*, 60 Iowa 134; pawnbrokers make daily report of pledges. *Launder* v. *Chicago*, 111 Ill. 291. Railroads may be required to render monthly return of violations of 16-hour law; *Balto. & Ohio R. R. Co.* v. *Int. Com. Comm.*, 221 U. S. 612; and to make annual reports involving much detail and labor; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423.

Counsel in the *Arver* case No. 663 (brief, 34) list eleven instances of peculiar service said not to be covered by the Thirteenth Amendment, and comment upon them. We do not attempt to cover the bounds of history, nor to enumerate all the exceptional cases sanctioned by immemorial usage, nor, being unable to forecast the extent of the public necessities in analogous cases in the future, do we try to embrace all instances of service which the citizen may be required to render his Government. The striking fact is that in many cases in which compulsory service has been regarded as exceptional, the analogy to

which reference is made as a fact universally admitted, is that of compulsory military service. A typical passage is *In re Dassler*, 35 Kans. 678, in which compulsory labor on the public roads was held not to contravene the Thirteenth Amendment. The court said (p. 684):

> Such labor has never been regarded or construed by any of the authorities as falling within the terms of the constitution prohibiting slavery and involuntary servitude. Militia service is also compulsory, and if the theory of the petitioner is correct, such service, when involuntary, is within the terms of §6 of the bill of rights, and the thirteenth amendment to the constitution of the United States. Such however is not the case, and we do not think that art. 8 of the constitution of this state conflicts in any way with §6 of the bill of rights or with the thirteenth amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways, and training in the militia.

See also *Bragg* v. *People*, 78 Ill. 328, 330; *Hoke* v. *Henderson*, 4 Dev. (N. Car.) 1, 29; *State* v. *Wheeler*, 141 N. Car. 773, 777; *People ex rel. German Ins. Co.* v. *Williams*, 145 Ill. 573, 583.

An instructive precedent may be found in the legislation affecting the Northwest Territory, important under the reasoning of this court in *Butler* v. *Perry*, *supra*, p. 332. It seems the first appearance of the lan-

guage "neither slavery nor involuntary servitude" was in Jefferson's handwriting in 1784.[1] Jefferson was at that time on a committee of Congress to provide for the government of the Northwest Territory. The Writings of Jefferson, Ford's ed., vol. III, pp. 407, 410, 428, 429; Thorpe, Constitutional History of the United States, vol. I, p. 261. The language is adopted in the Northwest Ordinance of 1787, art. 6, 1 Stat. 53. Other sections of the Northwest Ordinance are as follows:

> The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by Congress. (1 Stat. 51.)
>
> Art. II. * * * No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the

[1] Evidently the author did not believe that the language prohibited compulsory military service, for Jefferson presented a conscription bill to the Virginia legislature in 1777; and in his Annual Message to Congress on December 3, 1805, he recommended universal compulsory training. Jefferson's Works, Ford's edition, vol. 2, p. 123; vol. 8, pp. 384, 392. He explained his recommendation in a letter to General Kosciusko February 26, 1810. Jefferson's Works, Washington edition, vol. 5, pp. 506, 507:

"Two measures have not been adopted, which I pressed on Congress repeatedly at their meetings. The one * * * the other was to class the militia according to the years of their birth, and make all those from 20 to 25 liable to be trained and called into service at a moment's warning."

> land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. (1 Stat. 52.)

Very soon after the creation of the Northwest Territory laws requiring personal militia service were passed. Chapter 1 (published July 25, 1788) of the "Laws of the Territory Northwest of the River Ohio from the Commencement of the Government to the 31st of December, 1791," page 3 (Chase, Statutes of Ohio, vol. 1, p. 92), provides:

> § 1. All male inhabitants between the age of sixteen and fifty, shall be liable to and perform military duty, and be formed into corps in the following manner.

All male inhabitants were required to be armed and equipped, and to assemble on the first day of each week, and as the Commander-in-Chief might direct. Chapter 8 of the above laws, page 30 (Chase, Statutes of Ohio, vol. 1, p. 102), passed November 23, 1788, required the officers of the militia to enroll all persons obliged to do military duty. A further amendment of July 2, 1791, chapter 23, page 66 (Chase, Statutes of Ohio, vol. 1, p. 113), provided that the captains of each company should order an assembly on the last day of every week in the year to exercise his company for two hours. These laws were reenacted September 16, 1799 (Chase, Statutes of Ohio, vol. 1, c. 86, p. 211).

A comprehensive militia law, repealing the former statutes dealing with the militia, was enacted December 13, 1799. Ch. CV, Statutes of Northwest Territory, contained in vol. 1 of Chase's edition of Statutes of Ohio, p. 245. Section 1 of this statute provides:

> That each and every free, able bodied, white male citizen, of the territory, who is or shall be of the age of eighteen years, and under the age of forty-five years, except as is hereinafter excepted, shall severally and respectively be enrolled in the militia * * *.

Provision is made in the law for calling forth the militia by classes. Secs. 16, 33, 35, 36.

Compulsory military service thus was not regarded in the Northwest Territory as "involuntary servitude." The Northwest Ordinance itself, which uses the language of the Thirteenth Amendment, also provides for militia service and for other particular compulsory personal service when necessary "for the common preservation." It is just as clear now as it was in 1787 that both classes of service rendered in performance of duties to the State are not slavery nor akin thereto.

IV.

THE ACT IS NOT UNCONSTITUTIONAL ON THE GROUND THAT STATE OFFICIALS AID IN ITS ENFORCEMENT.

Counsel for plaintiffs in error in the *Arver, Grahl, O. Wangerin,* and *W. Wangerin* cases, Nos. 663, 664, 665, 666, present as their third point that the pro-

visions that State officials aid in the enforcement of the act are contrary to section IV of the Constitution and Article X of the amendments. Apparently the contention is (1) that the State loses its republican form of Government; and (2) its reserved rights under the Constitution are infringed. Briefs, pp. 40, 43, 48.) These points are not presented by plaintiffs' demurrer to the indictment, nor in the specifications of error in this court. Brief, p. 4.

The contention as to the guaranty of a republican form of Government is so wholly without merit as to justify no discussion. Moreover, the courts have no jurisdiction to consider it. *Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

As to the point that the State officials may not be required to aid in the enforcement of the law, plaintiffs in error are in no better position to raise the question. They are not State officials themselves nor is any State official here objecting. No statutory or constitutional provision of any State is cited as being infringed. If and when State officials appointed to carry out the Selective Draft Law do not voluntarily aid in the execution of the Federal law, questions as to the invasion of their rights and the State's sovereignty may properly be considered.

In executing the Federal law, however, State officials are *pro hac vice* Federal officials. It is settled that power may be conferred upon State officers as such to execute duties under an act of Congress in absence of contrary statutory or constitutional pro-

visions of the State. *Prigg* v. *Penna.*, 16 Pet. 539, 622; *Robertson* v. *Baldwin*, 165 U. S. 275; *Levin* v. *United States*, 128 Fed. 826. This principle was applied in *Dallemagne* v. *Moisan*, 197 U. S. 169, where an arrest of a sailor in accordance with treaty provisions by a State policeman was held valid.

During the Civil War the act of July 17, 1862, c. 201, 12 Stat. 597, calling out the militia was administered largely by State officials upon request of the President. It was held that Congress had power to authorize the State officers so to act, and that officers acted correctly in exercising the authority delegated. *In re Spangler*, 11 Mich. 298; *In re Griner*, 16 Wis. 423, 433; *Druecker* v. *Salomon*, 21 Wis. 621, 625; see *Allen* v. *Colby*, 47 N. H. 544.

In *Claudius* v. *Davie*, 169 Pac. 689, the Supreme Court of California refused to grant a writ of prohibition to prevent State officials from enforcing the draft law now in question.

As a matter of fact, it is highly consonant with the maintenance of local government in its full vigor, with the preservation of the rights of the State and of the individuals in different communities, that the law be understandingly administered by denizens of the respective communities, rather than by an extensive force of Federal officials.

V.

THE ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO ADMINISTRATIVE OFFICIALS.

This matter is discussed by counsel for plaintiffs in error in cases Nos. 663, 666, briefs, pp. 49 to 55. (Counsel in the *Ruthenberg* case, No. 656, also raise the point, brief, p. 31.)

The Selective Draft Law makes legislative provision for an army with which to prosecute the war. The general rules for increasing the military establishment are prescribed. As to the draft, the statutory provisions are as specific as is reasonably practicable. The rule is laid down of universal liability to military service for all male citizens between the ages of 21 and 30 years. (Sec. 2.) Men are to be called upon the principle of selective service, so that the entire resources of the Nation may be most effectively marshaled. Classes of exemptions are detailed in section 4 with this purpose in view. The President merely executes the legislative will. Large discretion in administration is of course absolutely essential. Such matters as the particular number of men required to meet shifting needs and the kinds of organizations into which they may most effectively be placed are administrative details peculiarly appropriate for the exercise of the discretion of the commander in chief, and particularly inappropriate for the inelastic decision of the deliberating legislative body.

The law is thoroughly well settled by the decisions of this court. At the last term, the section of the Reserve Bank Act authorizing the Federal Reserve Board "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds" was sustained. *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. This section is less specific as to the method of applying general rules than is the present law. The court, speaking through Mr. Chief Justice White, said (p. 427):

> * * * we think it necessary to do no more than say that a contention which was pressed in argument * * * that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Monongahela Bridge Company* v. *United States*, 216 U. S. 177; *Intermountain Rate Cases*, 234 U. S. 476.

The act of July 17, 1862, c. 201, 12 Stat. 597, which authorized the President, in calling out the militia of the States, to provide the entire body of procedure in those States which had no statutory provisions on the subject, was enforced in *In re Griner*, 16 Wis. 423; *Druecker* v. *Salomon*, 21 Wis. 621,

625; *In re Spangler*, 11 Mich. 298; *Allen* v. *Colby*, 47 N. H. 544; see *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225.

Counsel in the *Minnesota* cases, Nos. 663, 664, 665, 666, are unfortunate in their citation of cases. They cite *United States* v. *Blasingame*, 116 Fed. 654, and *United States* v. *Keokuk Bridge Co.*, 45 Fed. 178 (brief, p. 51). The former was expressly overruled in *United States* v. *Grimaud*, *supra*, 220 U. S. 506, 515. The latter was decided before and is inconsistent with the decisions of this court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Monongahela Bridge Co.* v. *United States*, *supra*.

Throughout our history the common method of providing for increase in the land forces has been simply to vest authority in the President to raise the necessary troops. See the following statutes:

Act March 3, 1791, c. 28, 1 Stat. 222, sec. 8.
Act May 28, 1798, c. 47, 1 Stat. 558.
Act March 2, 1799, c. 31, 1 Stat. 725.
Act Feb. 24, 1807, c. 15, 2 Stat. 419.
Act March 3, 1807, c. 39, 2 Stat. 443.
Act Jan. 2, 1812, c. 11, 2 Stat. 670.
Act Feb. 6, 1812, c. 21, 2 Stat. 676.
Act April 8, 1812, c. 53, 2 Stat. 704.
Act July 1, 1812, c. 119, 2 Stat. 774.
Act Jan. 29, 1813, c. 16, 2 Stat. 794.
Act Feb. 25, 1813, c. 31, 2 Stat. 804.
Act July 26, 1813, c. 27, 3 Stat. 47.
Act Jan. 28, 1814, c. 9, 3 Stat. 96.
Act Feb. 24, 1814, c. 16, 3 Stat. 98.
Act Jan. 27, 1815, c. 25, 3 Stat. 193, sec. 3.
Act May 23, 1836, c. 80, 5 Stat. 32.

Act July 5, 1838, c. 162, 5 Stat. 256.
Act May 13, 1846, c. 16, 9 Stat. 9.
Act May 13, 1846, c. 17, 9 Stat. 11.
Act June 17, 1850, c. 20, 9 Stat. 438.
Act July 22, 1861, c. 9, 12 Stat. 268.
Act July 25, 1861, c. 17, 12 Stat. 274.
Act July 31, 1861, c. 34, 12 Stat. 285.
Act July 17, 1862, c. 201, 12 Stat. 597, sec. 3.
Act March 3, 1863, c. 75, 12 Stat. 731.
Act Feb. 24, 1864, c. 13, 13 Stat. 6, sec. 1.
Act July 4, 1864, c. 237, 13 Stat. 379.
Act April 22, 1898, c. 187, 30 Stat. 361, sec. 5.
Act May 11, 1898, c. 294, 30 Stat. 405.

VI.

THE ACT DOES NOT INFRINGE THE PROVISIONS OF THE CONSTITUTION CONCERNING THE JUDICIAL POWER. ARTICLE I, SECTION 8, CLAUSE 9; ARTICLE III, SECTIONS 1 AND 2.

Counsel in the *Ruthenberg* case argue that the act by authorizing the President to establish in his discretion local boards to determine the inclusion or discharge of individuals or classes of individuals from the selective draft usurps judicial power (No. 656, brief, p. 33).

The boards of exemption do not exercise judicial power. They determine conditions of fact necessary to be ascertained by the Executive in enforcing the law. The boards aid in carrying out the legislative requirements that those subject to the draft who under all the circumstances may best be spared and are best qualified should render military service. Their duties are administrative. Surely it will not

be urged that in order to select the recruits for our defense the Federal courts must first pass upon every claim for exemption while meantime the armies of the enemy progress.

If the boards of exemption usurp judicial power then the board of tea inspectors does likewise in passing upon the quality of tea fit for importation, *Buttfield* v. *Stranahan*, 192 U. S. 470, 497, to the contrary notwithstanding; then does also the Secretary of the Interior in determining who is an Indian within the terms of a land grant, in spite of *West* v. *Hitchcock*, 205 U. S. 80. The executive who determines whether an alien is fit physically to enter the United States does not invade the province of the Federal judiciary; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 338–340; see *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; nor do the boards of special inquiry in determining the claims for admission of aliens to our shores. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, this court held that the Secretary of War does not exercise judicial powers in determining whether a bridge is an unreasonable obstruction to navigation (pp. 385, 387).

A contention similar to that now considered was raised in *Zakonaite* v. *Wolf*, 226 U. S. 272, with reference to the power of executive officials to determine the facts upon which a deportation order of an alien may be based. In a memorandum opinion this court disposed of the contention as follows (p. 275):

> The appellant raises some other constitutional objections, viz.: * * * that the

[immigration] act vests judicial powers in an executive branch of the Government * * *. These are without substance, and require no discussion.

VII.

THE DUE-PROCESS CLAUSE OF THE CONSTITUTION IS NOT VIOLATED.

Counsel in the *Minnesota* cases, Nos. 663–666, raise the point that the act deprives citizens of all liberty without due process of law "since it assumes to confer upon the President of the United States discretionary and arbitrary powers in the selection of citizens into the draft army" (briefs, pp. 55, 56). It is asserted that citizens may be selected "upon the whim of a State official" (briefs, p. 61). The due process point is raised in the *Jones* case, No. 738 (R. p. 15); in the *Kramer* case, No. 681 (R. p. 35); in the *Ruthenberg* case, No. 656 (brief, pp. 35–37).

There is no charge that the act requires an arbitrary selection of citizens. No complaint is made that the act has been arbitrarily or unfairly administered. The contention is that discretionary powers are granted to the President in its administration to so large an extent that he or his subordinates may act upon their mere caprice.

Nothing in the law justifies this assertion. Large discretionary powers in executing the law are granted and necessarily granted, but the act as a whole provides a fair and orderly method of selection for military service, and forbids the unjust and dictatorial caprice which counsel believe to be authorized.

From the point of view of due process of law, a proceeding is most surely authorized if it was a normal and customary method with the people of this country at the time the Constitution was adopted *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

It is true that the law provides for the restraint of the liberty of the citizen to a certain extent. Yet to protect most truly the liberties of people who live together in communities it is plain that some governmental organization and some exercise of governmental powers are necessary. The pioneer on the frontier may be subject to no master. There is no absolute freedom, however, in civilized societies. Our own history prior to the adoption of the Constitution, and the present experience of one of the Allies, vividly show, moreover, that the government which exercises least powers may be the instrument of tyranny in the hands of domestic disturbers, as well as the facile tool of foreign conquerors. The Federalist, speaking to the point in 1787, states (No. 26; pp. 170, 171):

> It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between power and privilege, and combines the energy of Government with the security of private rights.
> * * *
> The idea of restraining the Legislative authority, in the means of providing for the national defense, is one of those refinements,

> which owe their origin to a zeal for liberty more ardent than enlightened. * * * And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of Government is essential to the welfare and prosperity of the community.

Illustrations may be cited without number to show that in order to protect the liberties of the people as a whole the individual citizen may incidentally or temporarily be restrained of his liberties. It was in a case upholding the power of the State to compel vaccination that Mr. Justice Harlan said (*Jacobson* v. *Massachusetts*, 197 U. S. 11, 29):

> The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.

Yet military service, cited as the extreme example of restriction of personal liberty, is only temporary, incidental to the security of the citizens as a whole, and only so far imposed as is necessary for the purpose. The few who are compelled to serve do so that the many who remain at home at the present time, and the generations who come in the future, may

enjoy those blessings of freedom which this Government was established to secure.

VIII.

THE SELECTIVE DRAFT LAW NEITHER ESTABLISHES A RELIGION NOR PROHIBITS ITS FREE EXERCISE.

Counsel in the *Kramer* case, No. 681, and in the *Goldman* and *Berkman* case, No. 702, assign as error that the Selective Draft Law

> violates Article I of the Amendments of the United States Constitution which reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (R. No. 681, p. 34.)

The Selective Draft Law exempts from military service

> a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant. (Sec. 4.)

This provision has nothing in it "respecting an establishment of religion." The law recognizes the right of every citizen to choose religious affiliations without restriction. It goes so far as to aid

in the free exercise of those religions which forbid participation in war.

Under section 4 also may be exempted "those found to be physically or morally deficient" and those with dependents. It will not be argued that the law establishes a status of physical or moral deficiency, or of financial dependency; nor that freedom to change these conditions is prohibited.

IX.

OTHER CONSTITUTIONAL QUESTIONS UNDER THE ACT.

1. Counsel in case No. 702 contend that Article I, section 8, clause 12, of the Constitution is violated in that appropriations for the support of the army are made for more than two years (brief, p. 90). Probably counsel did not notice that the Selective Draft Law which is now in question makes no appropriation whatsoever.

2. Counsel in the same case assign as error a violation of Article IV, section 2, subdivision 1 (R. No. 702, p. 537). Their brief contains no discussion on this point.

3. They also suggest that the act denies citizens the equal protection of the laws (brief No. 702, p. 96).

The clause in the Fourteenth Amendment guaranteeing equal protection of the laws is addressed not to Congress but to the States. Amendment XIV; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158, 159.

Granting, however, that Congress were restricted by a similar clause, each of the exemptions pro-

vided by the Selective Draft Law has reason behind it (sec. 4). The law proceeds upon the equitable principle that all citizens are subject to call as their particular services are demanded. Exemptions are provided from direct military service because service in other capacities aids more directly in the successful prosecution of the war.

Exemptions to greater or less extent have been contained in every compulsory military service law passed by the States of the United States (see Appendices "A," "B," "C," *infra*, pp. 123, 131, 133). It is interesting that Quakers and conscientious objectors were frequently exempted during the Revolutionary War:

Virginia, Act July 1775, c. 1, 9 Hening, St. L. pp. 9, 28, 34.

Virginia, Act October 1777, c. 1, 9 Hening, pp. 337, 345.

North Carolina, Laws April, 1778, c. 1, sec. 13, vol. 24, State Records 190, 193.

New Hampshire, Metcalf's ed., vol. 4, pp. 273, 274, Act March 18, 1780, c. 12.

Rhode Island, Laws, February, 1777, pp. 8, 17.

Rhode Island, Laws, October, 1779, pp. 29, 38.

New York, Act April 1, 1777, c. 28, Laws N. Y., vol. 1, 1777 to 1784, pp. 51, 54.

New York, Act April 3, 1778, c. 33, Laws *supra*, pp. 62, 70–71.

New York, Act March 11, 1780, c. 55, Laws *supra*, p. 237, 245.

New York, Act April 4, 1782, 5th sess., c. 27, Laws 440, 449.

Massachusetts, Resolves June 12, 1778, c. 51 p. 13.

Massachusetts, Laws 1781, c. 21, p. 33.

Massachusetts, Act. Mar. 10, 1785, Perpetual Laws of Mass. 1780–1789, pp. 338, 347, secs. 42, 43.

On the other hand, the usual exemption to Quakers was not extended in Pennsylvania. See Act of March 20, 1780, c. 92, vol. 10, Stat. L., pp. 144, 146.

If the argument against this law upon constitutional grounds be not frivolous, then that adjective has lost its legal significance.

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PART TWO.

OTHER ERRORS ASSIGNED.

No. 656.

Charles Ruthenberg, Alfred Wagenknecht, and Charles Baker, plaintiffs in error, v. The United States.

STATEMENT.

Defendants Ruthenberg, Wagenknecht, and Baker were indicted with one Schue for violation of section 5 of the Selective Draft Law—Schue's wilful failure to register. Schue pleaded guilty (R. 65, 66). The charge against Ruthenberg, Wagenknecht, and Baker was that they aided, abetted, counseled, commanded, and induced Schue to violate the law (R. 1, 2), sec. 332, Criminal Code, 35 Stat. 1088, 1152, act of March 4, 1909, c. 321, sec. 332.

The facts are in small compass. Schue's testimony was as follows: He was of draft age (R. 50), and would certainly have registered if he had not heard about the Socialist peace meetings and listened to Baker speak at the meeting of May 20, 1917, in the public square in Cleveland, and to the speeches of Wagenknecht and Ruthenberg at the meeting of May 27 (R. 51, 56, 57). Baker announced that all socialists would refuse to register with the full support of the socialist party; that he would rather be shot here as a man than be shot in the trenches of Europe as a dog (R. 51, 52).

At the meeting of May 27, Max Hays, the first speaker, advised compliance with the law (R. 52). Wagenknecht, who followed, said that Hays's attitude did not comply with the standpoint of the socialist party (R. 78, 92). Wagenknecht continued "you can either obey or disobey the law. You can either disobey the law and go to jail or obey it and eat gravel and dust the rest of your life" (R. 53). "We will fight and fight and fight [conscription] until there is no more fight left in us (R. 54).

The stenographic report of Wagenknecht's speeches includes the following (R. 80):

> Well, the question is, of course,—you may applaud here this afternoon—but after a bit the question will be this: how many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register * * *.

Soon after this the speech was interrupted by Wagenknecht's arrest. Ruthenberg then took up the challenge. He said that "if he was of military age and if he was asked to go he would rather have his body riddled with bullets than to submit to this here registration" (R. 55, 56).

Schue's evidence as to the speeches of Baker, Hays, Wagenknecht and Ruthenberg was corroborated by Lind (R. 66, 69), Stucky (R. 70, 71), and Farasey, a court stenographer, who took down the

speeches of Hays, Wagenknecht and Ruthenberg (R. 78–96). The Government's case in its main aspects was corroborated by defendants' witnesses (Bronstrup, R. 102; Fromholtz, R.110, 112; Wagenknecht, R. 127, 132; Ruthenberg, R. 149).

The theory of the defense was explained by Ruthenberg (R. 157):

> I will gladly explain, for the purpose of the court and jury, that I further stated, that rather than be conscripted, rather than be compelled to fight in this war, I would be stood against a wall and riddled with bullets. I might register and still not submit when I was conscripted. That was my position.
>
> (R. 158) You will remember that I did not say to them that they should refuse to register but said that they should refuse to be conscripted, which carried with it the fact that they might well submit to registration, but later they might claim exemption, they might raise all of the objection, and if they were still selected to fight in the army and they had these conscientious objections, which I stated I had, they could then refuse to do this work for the Government.
>
> Q. That is all you ever had in mind?
>
> A. That is my position.
>
> The Court: And did not your statement also carry with it that they might refuse to register?
>
> The Witness: Not necessarily.

The charge of the court was fair, and, if anything, favorable to the defendants. No exceptions

thereto were taken (R. 166, 171). The jury returned a verdict of guilty (R. 171). Now on writ of error we are asked to consider technical questions.

Counsel for plaintiffs in error make 59 assignments of error, which cover 23 pages of the printed record (R. 185–207). This is a violation of rule 35. *Badders* v. *United States*, 240 U. S. 391, 394. In their brief all are abandoned except those embraced in 10 specifications of error. We treat them in order of presentation in defendants' brief.

I.

BOTH GRAND AND PETIT JURIES WERE REGULARLY IMPANELED.

Specifications 1–6 concern rulings on the challenge to the array of the grand and petit juries.

1. The first (brief, p. 4) is that the trial court erred in not sustaining the challenge to the arrays on the ground that defendants were members of the Socialist Party and were without representation on the jury board. Section 276 of the Judicial Code, act of March 3, 1911, c. 231, 36 Stat. 1087, 1164, amended by act of February 3, 1917, c. 27, 39 Stat. 873, requires the names of grand and petit jurors to be placed in the jury box by the clerk of the court and the jury commissioner,

> * * * which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known

> member of the principal political party in the district in which the court is held opposing that to which the clerk * * * may belong * * *.

It was proved that the jury commissioner was a well-known member of the principal political party in the district opposing that to which the clerk belonged (R. 30).

It is suggested, however, that section 276 is unconstitutional, in not providing for a jury commissioner of the socialist party. The Constitution guarantees the right of "an impartial jury." It leaves to Congress discretion as to the details in securing such impartiality. It would obviously be impracticable to require the presence upon the jury commission of members of all political parties which may spring up.

It is not argued that the political preference of the jury commissioner and of the clerk tended to secure a jury that was not wholly impartial.

2. The second specification of error, that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties (brief, p. 5), is passed over with little argument (brief, p. 13). The specification asserts violation (*a*) of section 276 of the Judicial Code and (*b*) of constitutional rights (brief, p. 5) (R. 38, 185).

Section 276 is satisfied. It provides that the names of the jurors are to be placed in the jury box by the clerk of the court and the jury commissioner,

> the clerk * * * and said commissioner each to place one name in said box alternately, without reference to party affiliations. * * * (39 Stat. 874.)

This was done. The record discloses that the clerk proceeded without reference to party affiliations of any of the persons that he selected (R. 31). He did not know that there were any names of Republicans or Democrats or Socialists put in either by himself, the jury commissioner, or the latter's predecessor (R. 31). The drawing was publicly made (R. 37), sec. 276, Judicial Code.

There is certainly no legal presumption of bias because the jury lists happen to be made up of Republicans and Democrats. This was not a political election, nor a debate upon the respective merits of political parties. It was a trial for inducing a susceptible young man not to register. In the stronger case, a jury which tries a negro is not disqualified because a negro is not a member thereof. *Martin* v. *Texas*, 200 U. S. 316, 320–321; *Thomas* v. *Texas*, 212 U. S. 278, 282.

The case of *Connors* v. *United States*, 158 U. S. 408, forecloses the defendants on this point. That was a trial for interfering with elections. Among many questions with reference to the politics of the jurors

submitted to them on their *voir dire*, to which the court refused to permit answer, was this (p. 412):

> Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

This court held that it would not disturb the ruling of the lower court, saying (p. 414):

> In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it can not be said that the court erred in disallowing it * * *. (415) But no such exceptional circumstances are disclosed by the record, and the court might well have deemed the question—unaccompanied by any statement showing a necessity for propounding it—as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial. * * * If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.

In *United States* v. *Eagan*, 30 Fed. 608, in sustaining a demurrer to a plea in abatement, Mr. Justice Brewer said (p. 609):

> * * * Neither party affiliation nor religious beliefs nor church adhesion affect the qualifications of a juror, grand or petit. * * *

In the same case Judge Thayer said (p. 612):

> * * * The fact that a man is a member of any political party is not a disqualification for jury service in any case, and practically that is all that is stated in the plea by way of disqualification of the five jurors in question. * * *

3. Specification 3 (brief, p. 7) is to the effect that the jury was incompetent because they were property owners and capitalists, hence biased. Of course ownership of property is not a disqualification. The jurors had not the most remote pecuniary interest in the outcome of the trial.

4. Specification 4 (brief, p. 7) is that the fourth ground of challenge should have been sustained, to wit: "That said juries have been selected and drawn exclusively from the eastern division of the northern district of Ohio, instead of from the entire district, contrary to the Sixth Amendment of the Constitution of the United States" (R. 9).

The statutes were complied with. The Judicial Code does not contemplate that jurors shall be returned from every corner of the district. Section 277 (36 Stat. 1164) provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court

> shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

The court in this case directed that the jurors be taken from the eastern division (R. 36). Probably in the trials in the western division of the district, citizens for jury service are selected from that division so as to comply with the statutory provision that no unnecessary expense be incurred, and the citizens be not unduly burdened. Mr. Miller, clerk of the court, testifying, said (R. 31):

> These jurors whose names have been selected are from the Eastern Division and every county in the Eastern Division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out. * * *

The contention is that section 277 is unconstitutional (brief, p. 15). The answer may be found in a mere reading of the sixth amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *.

The Constitution therefore guarantees the right to a jury of the State and district. The jurymen here challenged were unquestionably citizens of Ohio, and resident in the northern district thereof. What more is required?

The constitutionality of section 277 is settled. It represents the law since 1789, having been brought forward from section 802 of the Revised Statutes, and from a clause of section 29 of the Judiciary Act of September 24, 1789. (1 Stat. 72, 88, c. 20.) It was enforced in *Agnew* v. *United States*, 165 U. S. 36, 43, 44. See *Rosencrans* v. *United States*, 165 U. S. 257; *United States* v. *Wan Lee*, 44 Fed. 707; *United States* v. *Ayres*, 46 Fed. 651. In the latter case Judge Shiras said (p. 651):

> It cannot be possible that in framing the sixth amendment congress intended thereby to secure a constitutional enactment requiring juries to be summoned from an entire state or district, and at the same time, by the provisions of the judiciary act, declared that the courts should have the power to direct the juries to be summoned from parts only of the district.

In *United States* v. *Peuschel*, 116 Fed. 642, the court said concerning R. S. 802 (p. 646):

> This statute is almost as old as the government, having been a part of the judiciary act of 1789; and, the courts having acted upon it uninterruptedly for more than a hundred years, its constitutionality cannot now be successfully challenged.
>
> The plain and incurable vice of defendants' argument is its assumption that a defendant is entitled to a jury summoned from every part of the district. * * * The only constitutional right of the defendant is to a jury of which every member is a resident of a county

> or locality which, at the time the offense is alleged to have been committed, was a part of the district.

In *Clement* v. *United States*, 149 Fed. 305 (C. C. A. 8th C.; certiorari denied, 206 U. S. 562), the authorities are reviewed. In *Spencer* v. *United States*, 169 Fed. 562, R. S. sec. 802 was sustained, the court saying (pp. 565–6):

> The large number of counties which compose most judicial districts render it physically impossible to secure one grand juror, and very difficult to secure one petit juror, from each county of each district; hence, in the ordinary administration of the law governing the selection of jurors (section 800 et seq., Rev. St.), it would be impossible to secure a jury composed of one or more members from each county of a district. But in addition to this suggestion of convenience, it is apparent that one of the main purposes of the constitutional provision was to secure a trial by an impartial jury. The details of working out this main purpose were necessarily left to Congress.

See in accord *United States* v. *Merchants, etc. Trans. Co.*, 187 Fed. 355, 359, 362.

5. What we have said under the preceding point disposes of the fifth specification of error, which complains that certain counties were not represented among the names drawn for grand and petit jury service (brief, pp. 8, 9). In the eastern division of the Northern District of Ohio alone there are nineteen counties. Sec. 100, Judicial Code, 36 Stat. 1087,

1121. Every county, therefore, could not possibly be represented on the petit jury.

The record discloses moreover that the clerk placed in the box from which the drawings were made, names from all the counties of the district (R. 37).

6. Specification 6 (brief, pp. 9, 10) is as follows:

> The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service had been improperly selected.

The sole ground of impropriety urged is that (brief, p. 17):

> The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

This is not the subject of any assignment of error in the record. Assignments of error 17 and 18 (R. 190, 191) are based on the same proceedings (brief, p. 10). But the ground of error of assignment 17 is not that the clerk abdicated in performing his functions of jury selection, but as follows (R. 190):

> The trial court erred in refusing defendants to show that the names of the grand and petit jurors were chosen from the names of partisans of the Republican and Democratic parties, as is evident from the following testimony:

This is quite a different matter and has already been dealt with (*supra*, p. 90).

Assignment 18 is also a different matter:

> The court erred in refusing to permit B. C. Miller to answer in what manner the list of names sent in by Common Pleas Judges, as testified to by him, were selected, as is evident from the following testimony:
>
> Q. Do you know in what manner the list of names that were sent to you from the Common Pleas Judges as you have described, have been selected?
>
> A. Not in detail. Most of the Judges——
>
> Mr. Wertz: I object to that question; it would be hearsay.
>
> The Court: I sustain the objection to that question.
>
> Mr. Sharts: Enter an exception.

The point argued in defendants' brief "IV. Jury lists improperly selected" (p. 17) not being referred to in any assignment of error, violates rule 35 of this court, and need not be further considered. No objection was taken in the court below to the juries on the ground that the names of possible jurors were not selected by the clerk and the jury commissioner. It is not made a ground of the challenge to the arrays (R. 3); nor of the motion to quash (R. 12); nor of the plea in abatement (R. 14). Any objection on that score is therefore waived.

There is nothing of merit in the argument in any event. Section 276 requires the clerk and the jury commissioner to place the names of not less than 300 persons possessing the qualifications of jurors of the

highest court of the State (sec. 275) in the jury box. This was done. The performance of this duty was not delegated.

The Code does not prescribe the manner in which the clerk and the jury commissioner shall obtain information as to suitable names. When they placed the names in the box, regardless of where they may have been obtained, they exercised judgment that the persons named were proper jurors. In order to comply with section 275 the clerk naturally turned to those whose qualifications as State jurors were known (R. 31, 32). He put names in the jury box of men that he knew personally and of others that were suggested to him (R. 32).

This matter, again, is not of substance. No prejudice to the defendants is shown or hinted at. It is not alleged that the jurors selected were not properly qualified. Since the point is raised for the first time upon writ of error, section 1025, R. S., is of especial force.

II.

THE INDICTMENT WAS REGULARLY FOUND AND WAS SUFFICIENT IN FORM.

1. The motion to quash was properly denied.

We pass to the alleged error in refusing to quash the indictment specification 7. Seven grounds are relied upon (brief, p. 11).

A motion to quash is an appeal to the discretion of the trial court. *Durland* v. *United States*, 161 U. S. 306, 314; *Holt* v. *United States*, 218 U. S. 245. It is a

preliminary motion refused except in the clearest cases. *United States* v. *Rosenburgh*, 7 Wall. 580, 583.

The various grounds of the motion to quash in this case are not calculated to appeal favorably to those charged with the administration of justice.

1. The first ground is (brief, p. 11):

> The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

So far as this is made one of the grounds of the plea in abatement (brief, pp. 11, 12), the plea is here considered.

If it is meant that the grand jury were not sworn, the contrary appears. The indictment states (R. 1):

> The grand jurors * * * empaneled and sworn * * * upon their oath present * * *.

And this is sufficient showing that the oath was properly taken. *Powers* v. *United States*, 223 U. S. 303, 312.

If it is meant that no sworn charge was presented to the grand jury (apparently so, see assignment 22 R. 192), this is not necessary. *Frisbie* v. *United States*, 157 U. S. 160, 163. In *Hale* v. *Henkel*, 201 U. S. 43, 59, 60, it was held that the grand jury may proceed without the formality of a written charge.

As to the evidence and the witnesses before the grand jury, the pleadings tendered are not sufficient.

It is not alleged that there was no evidence and that no witnesses were sworn. It is averred merely that there were no testimony and witnesses "in a particular case." If it had been intended to allege that no evidence and no sworn witnesses whatsoever were presented, the words "in a particular case" would not have been added.

But the grand jury may investigate generally. Particularity is usually the end, not the beginning of their proceedings. *Hendricks* v. *United States*, 223 U. S. 178, 184. In the present case, the grand jury was a special body, investigating violations of the Draft Act (R. 17).

It may be urged that counsel intended to allege that the witnesses were not sworn in a particular case, and that no proper testimony was presented to the grand jury at all. If a comma had been placed after the words "without any proper testimony having been presented to said grand jury," strength might be lent to such contention. But although the comma appears in the proffered plea (R. 17, 195, Brief, p. 12), counsel evidently regard it as immaterial, for it is omitted in the motion to quash, where precisely the same phraseology is used (R. 13, Brief, p. 11), and in the amended assignments of error (R. 192).

"Strict exactness" is required in dilatory pleadings of this sort. *Agnew* v. *United States*, 165 U. S. 36, 44. The allegations must be taken most strongly against the pleader.

Assume, for the sake of argument, that the motion and plea state that the grand jury presented the indictment "without any proper testimony having been presented" at all. It is not said that no testimony was presented. That this was not intended is clear from the plea, which states "without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive" (R. 17). Wherein does the impropriety of the testimony consist? Was the evidence competent, but improperly obtained? See *Hillman* v. *United States*, 192 Fed. 264; certiorari denied, 225 U. S. 699. Was it competent, but weak? See *Holt* v. *United States*, 218 U. S. 245. The facts from which impropriety might be concluded are not revealed. No offer was made to prove the facts. Indeed, the validity of the ground alleged is stated in the motion to quash to be "apparent upon the face of the record" (R. 12), and nothing new is alleged to have been discovered when the plea in abatement was offered on the same day (R. 45).

The pleadings assert a pure conclusion of law. Some showing of facts at least is required before the presumption of the regularity of grand jury proceedings is overcome. We need not recur therefore to the cases showing the abuses which would result from reexamination of the sufficiency of the evidence before the grand jury, and enforcing the general rule that such review can not be made. *Cobban* v. *United States*, 127 Fed. 713, 718, 721; *Radford* v. *United States*, 129 Fed. 49, 51; *McGregor* v. *United*

States, 134 Fed. 187, 192, 193; *McKinney* v. *United States*, 199 Fed. 25; *Hillman* v. *United States, supra; United States* v. *Thomas*, 145 Fed. 74, 75; *In re Kittle*, 180 Fed. 946, 947; especially where the plea is sworn to only on belief (R. 17). See *United States* v. *Nevin*, 199 Fed. 831, 836. A case similar to the one at bar is *Holt* v. *United States*, 218 U. S. 245, 247, 248.

State v. *Dailey*, 72 W. Va. 520, is squarely in point. In that case a writ of prohibition was granted against a trial judge to prevent the filing of a plea in abatement that the grand jury acted upon wholly illegal evidence. Many cases in the State courts are cited in the opinion.

2. The second ground of the motion to quash now relied on (brief, pp. 11, 19) is:

> The failure of the indictment to state that Schue was a citizen or a male person not an alien enemy who had declared his intention to become a citizen.

Section 5 of the Selective Draft Law makes no exception such as here suggested. It requires "all male persons between the ages of 21 and 30, both inclusive, to be registered except officers and enlisted men of the Regular Army, Navy, and National Guard and Naval Militia while in the service of the United States." Schue was not one of the excepted classes (R. 61). If he had been, the indictment need not anticipate affirmative defenses.

Section 2, exempting alien enemies from the draft does not narrow section 5. An alien enemy is required to be enrolled, but not drafted.

3. The third ground of the motion to quash is that the indictment fails to state that the President's proclamation had been published prior to the commission of the offense. As we read the indictment, it states that Schue, on June 5, 1917, "was then and there required, by the Proclamation of the President of the United States dated May 18, 1917 * * *"; that he refused to register "as in said Act provided and in said Proclamation appointed" (R. 2).

4. The fourth ground is not pressed in the argument.

5. The fifth is that the indictment "alleges three separate offenses in one count" (brief, pp. 11, 21).

Only one offense is charged, the failure of Schue to register. The acts of Ruthenberg, Wagenknecht, and Baker in inducing, aiding, counseling, commanding Schue, do not constitute a separate crime. They are all principals in the commission of the one violation of law. Sec. 332, Criminal Code; *Connors* v. *United States*, 158 U. S. 408, 410, 411.

6. The next ground of the motion to quash is the alleged failure of the indictment to set forth the nature and cause of the accusation (brief, pp. 11, 22).

Defendants were fully advised by the indictment of the crime with which they were charged. They do not hint at surprise or difficulty in the preparation of their defense. They knew the speeches that

caused their arrests. Since they were not prejudiced in any way, the conviction must stand (R. S., sec. 1025). If they had desired more particularity they should have requested a bill of particulars. *Lamar* v. *United States*, 241 U. S. 103, 116, 117; *Bartell* v. *United States*, 227 U. S. 427, 432.

7. The last ground of the motion to quash is that the indictment charges defendants as accessories to a statutory misdemeanor (brief, pp. 11, 25).

It is not easy to catch the meaning of this specification. Defendants were indicted for procuring the commission of a violation of section 5 of the Selective Draft Law. They are not accessories, but principals in the commission of that crime. Sec. 332, Criminal Code.

2. The court correctly refused to allow the proffered plea in abatement to be filed.

The eighth specification of error refers to the refusal of the court in this regard (brief, p. 11).

The merits of the plea, which simply reiterated the grounds of the motion to quash, have already been considered, *supra*, pp. 99–105.

The plea, moreover, came too late. In *Agnew* v. *United States*, 165 U. S. 36, the indictment was returned December 12, plaintiff in error was arraigned December 17, and filed a plea in abatement on that day, alleging impropriety in the selection of the grand jury. This court held that the plea was properly refused, stating (p. 44):

> * * * certain rules may be regarded as generally applicable. One of these rules is

> that the defendant must take the first opportunity in his power to make the objection. * * * Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception.
>
> (p. 45) * * * The plea does not allege want of knowledge of threatened prosecution on the part of the defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before * * *.

In *Hyde* v. *United States*, 225 U. S. 347, this court said (p. 373):

> It is said in the *Agnew Case* that pleas in abatement on account of irregularities in selecting and impaneling a grand jury which did not relate to the competency of individual jurors must be pleaded with strict exactness and that a defendant must take the first opportunity in his power to make the objection. The indictment in that case was returned December 12, 1895; the plea in abatement was filed on the 17th of that month. It was held to have been filed too late.

In the present case the drawings of the grand and petit juries, respectively, were made pursuant to orders of the court, on June 16, 1917, and July 3, 1917 (R. 37, 38). The indictment was returned June 27 (R. 2). The challenge to the array of the grand jury and petit jury was filed on July 14 (R. 3). On July 17, the Government entered a general denial to the challenge (R. 11). The motion to quash and the plea in

abatement were not presented until July 18, or about three weeks after the indictment was returned (R. 45). No excuse for the delay is offered in either pleading.

3. There was no error in overruling the demurrer to the indictment.

The grounds of the demurrer have already been examined. (Specification of error 9.) (Brief, p. 12.)

III.

THE COURT PROPERLY RULED OUT THE QUESTIONS PROPOUNDED TO THE PETIT JURORS ON THEIR VOIR DIRE AS TO WHETHER THEY DISTINGUISHED BETWEEN ANARCHISTS AND SOCIALISTS.

This is the subject matter of the last specification, 10 (brief, p. 12, 37).

In *Holt* v. *United States*, 218 U. S. 245, 248, this court said:

> The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States*, 98 U. S. 145. *Hopt* v. *Utah*, 120 U. S. 430. *Spies* v. *Illinois*, 123 U. S. 131.

In the present case the discretion of the lower court was not abused. How the juror's fitness would be affected is not shown. Possible prejudice against anarchists or socialists is not enough. See the *Connors* case, *supra*, p. 91.

In *Thiede* v. *Utah Territory*, 159 U. S. 510, a saloon keeper was convicted of murder. A juror admitted on the *voir dire* that he was prejudiced against the saloon business. He was held competent. The court said (p. 516):

> But the charge against the defendant, the matter to be tried, had no reference to the occupation in which he was engaged, and, therefore, a prejudice against such occupation is entirely immaterial. In *Spies* v. *Illinois*, 123 U. S. 131, a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror.

The *Spies* case is conclusive against the defendants on the present point. See 123 U. S. 172, 174, 176, 179.

No. 680.

Louis Kramer and Morris Becker, plaintiffs in error, v. The United States.

I.

THE EVIDENCE WARRANTED THE CONVICTION.

The indictment was for a conspiracy of Kramer, Becker, Walker, and Sternburg, to induce men of draft age not to register. Section 5, act of May 18, 1917; section 37, section 332 of the Criminal Code, act of March 4, 1909, c. 321, 35 Stat. 1088.

Walker was acquitted by the jury (R. 259), and Sternburg was discharged after a directed verdict (R. 241).

Evidence of the conspiracy on behalf of the Government was as follows: Kramer and Becker both testified that they were members of the No-Conscription League (R. 90, 105, 106, 108, 177). They attended its meetings (R. 201) and believed in its principles (R. 96, 102, 187). The purpose of the league was to resist conscription by all means in its power (R. 102), and to aid conscientious objectors who came in conflict with the Government (R. 266).

Becker and Kramer were members of a committee of the league formed to advertise a mass meeting proposed for Hunt's Point Palace on June 4, the eve of registration (R. 95, 105, 112, 196, 263). The committee agreed to hand out circulars announcing the

proposed meeting (Govt. Ex. 1, R. 16, 263) at a public gathering in Madison Square Garden on May 31, 1917 (R. 95, 105, 106, 110). Kramer and Becker repaired to the Madison Square Garden on the evening of May 31. They were seen talking together (R. 14). Both held bundles containing the advertising circulars (Govt. Ex. 1); also smaller circulars [1] containing the platform of the No-Conscription League (R. 19, Govt. Ex. 2, R. 264). The defendants were distributing both kinds of circulars (R. 15, 25, 35, 80, 117, 231). Kramer motioned with his hands as to the direction in which the bundles should be distributed (R. 14, 81). He seemed to be the boss of the committee work (R. 28, 85).

While Kramer was handing out pamphlets he was overheard to tell an unknown man not to register, that it would help the cause (R. 35, 36, 44, 82, 84).

The defendants were arrested on the spot (R. 53, 178), having still in their possession both classes of circulars (Kramer, R. 19, 37, 209, 228; Becker, R. 53, 54). While the officers were taking Kramer away he called to some one in the crowd to tell the chief (R. 53, 70).

Seven overt acts are charged: (1) On May 31, 1917, Kramer gave a leaflet entitled "No-Conscription" (Govt. Ex. II), signed by the No-Conscription League, to an unknown person, and requested him to refuse to register; (2) on May 31, 1917, Kramer

[1] These circulars are the same as those introduced in the Goldman and Berkman case. Excerpts are printed *infra*, p. 114.

gave to one Finan a leaflet entitled "No-Conscription." "Mothers, Fathers, Sons—turn out to protest against conscription" (Govt. Ex. 1), and requested Finan to refuse to register; (3) Becker on May 31, 1917, gave to several unknown persons the latter leaflet; (4) Becker on May 31, 1917, had in his possession a number of pamphlets of the first title; overt acts 5, 6, and 7 are alleged to have been committed by Walker and Sternburg (R. 6, 7). Proof of commission of overt acts was ample. As to the first overt act charged see R. 35, 36, 43, 82, 84; as to the second see R. 16, 72; as to the third see R. 53, 96. The overt acts in themselves constitute proof of the character of the conspiracy.

The testimony for the defense consisted largely in a series of denials (see R. 261, 262). The charge of the court was fair (R. 243). The jury were entitled to believe the testimony of the Government's witnesses, and justly arrived at the verdict of guilty.

No. 702.

Emma Goldman and Alexander Berkman, Plaintiffs in Error, v. United States.

The brief for plaintiffs in error in this case presents two points in addition to the contention of unconstitutionality: (1) That the indictment is insufficient; (2) that there was no evidence of defendants' guilt.

I.

THE INDICTMENT WAS SUFFICIENT.

The indictment charged that the defendants, together with divers unknown persons, conspired to induce men of draft age not to register as required by section 5 of the act of May 18, 1917, Public No. 12, 65th Congress; section 37 and section 332 of the Criminal Code (35 Stat. 1088, c. 321). Five overt acts are charged (R. 2–6) and, as acts, admitted: (1) Emma Goldman on May 18 made a speech at a public meeting in the Harlem River Casino in New York (R. 137); (2) Berkman on June 1 published "The Blast," vol. 2, No. 5 (R. 55, 111, 171, 475); (3) on June 2 Miss Goldman gave to one Haggerty a copy of the June, 1917, issue of "Mother Earth" (R. 130, 132, 478); (4) Berkman delivered an address on June 4 at Hunt's Point Palace; and (5) Emma Goldman delivered a speech at the same time and place (R. 165, 421).

The indictment states a crime. It is not a necessary ingredient that the purpose of the conspiracy be consummated. There is no merit in point one.

II.

THE EVIDENCE OF GUILT WAS AMPLE.

Evidence on behalf of the Government tending to prove the conspiracy is as follows:

Defendants, if not the organizers, were active members and leading spirits of the No-Conscription League (R. 18, 19). The fact of the confederation between the two defendants and others is shown by their work in connection therewith. The organization was effected on May 9, 1917, at Miss Goldman's apartment, both defendants being present (R. 22, 23, 33). Plans were laid for the mass meeting of May 18 (R. 24). Further preliminary meetings of the inner circle were held on Wednesday evenings May 16 and 23 (R. 258, 343). Both defendants were present on May 16, when plans for the mass meeting of May 18 were perfected (R. 27, 63). Berkman presided over the group meeting of May 23 (R. 242), also held at Miss Goldman's apartment (R. 281), at which arrangements were made for the mass meeting of June 4. Miss Goldman being in Massachusetts at the time, sent a message purporting to give her stand on registration (R. 531).

The office of the league was in the same building in which the defendants had offices (R. 17). Berkman held the money collected (R. 42, 43, 47, 465); ordered and paid for thousands of circulars (R. 95,

96, 100, 103, 104); rented the Harlem River Casino for the mass meeting of May 18 (R. 28, 29, 454, 455).

The purpose of the league was, as its name implied, to work against conscription. A manifesto was issued May 25, 1917, announcing in part as follows (R. 453):

> The No-Conscription League has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men. The No-Conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:
>
> We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.
>
> We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.
>
> We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.
>
> We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.
>
> (R. 454) Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the government. Help us

to publish literature against militarism and against conscription.

We consider this campaign of the utmost importance at the present time. Amid hateful, cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York.

In order to enlist as many as possible in the effort to resist "by every means in our power" and to "sustain those who, for similar reasons, refuse to be conscripted," large public mass meetings were arranged, at which direct appeals were made not to register. On May 18 at the Harlem River Casino mass meeting the defendant Goldman said in part (R. 138, 478):

We don't believe in conscription, this meeting to-night being a living proof. This meeting was arranged with limited means. So, friends, *we who have arranged the meeting* are well satisfied if we can only urge the people of entire New York City and America, there would be no war in the United States—there would be no conscription in the United States—(applause)—if the people are not given an opportunity to have their say.

(R. 482) Now, friends, do you suppose for one minute that this Government is big enough and strong enough and powerful enough to stop men who will not engage in the war because they don't want the war, because they don't believe in the war, because they are not going

to fight a war for Mr. Morgan? What is the Government going to do with them? They're going to lock them up. You haven't prisons enough to lock up all the people (applause).

(R. 483) How many people are going to refuse to conscript, and I say there are enough. I would count at least 50,000, and there are enough to be more, and they're not going to when only they're conscripted. They will not register (applause).

We are going to support all the men who will refuse to register and who will refuse to fight (applause). (See also R. 161, 404.)

We want you to fill out these slips and as you go out drop them into the baskets at the door. We want to know how many men and women of conscriptive age—and they're going to take women and not soldiers.

(R. 484) We will have a demonstration of all the people who will not be conscripted and who will not register. * * *

I will say, in conclusion, that I, for one, am quite willing to take the consequences of every word I said and am going to say on the stand I am taking. I am not afraid of prison—I have been there often.

(R. 485) So, friends, it is our decision tonight. We are going to fight for you, we are going to assist you and co-operate with you, and have the grandest demonstration this country has ever seen against militarism and war. What's your answer? Your answer to war must be a general strike, and then the governing class will have something on its hands. (See R. 161, 162, 410–415, 417—Ex. 61, 62, R. 513.)

This language is from the stenographic reports. There can be no doubt of its correctness. Two stenographers, neither of whom knew that the other was there, caught the same language, the notes and transcripts not being compared (R. 137, 138, 417).

On the eve of registration, June 4, at Hunt's Point Palace, another mass meeting was held (R. 71, 72). Many men of draft age were among the thousands present (R. 360). Both defendants made speeches, which were reported by a stenographer employed by defendants (R. 165, 487). The report is admittedly correct (R. 421). Berkman said in part (R. 487):

> But we say further to you, if you believe in liberty, if you pretend to fight for liberty and democracy how can you force us to do what we don't want to do? (Great applause and cheering.)
>
> (R. 489) Don't make light of it, because it is the most terrible and tragic moment in the life of the country. Conscription in a free country means the cemetery of liberty, and if conscription is the cemetery then registration is the undertaker. (Great applause and cheers and boos, and something thrown at the speaker that looked like a lemon.)
>
> All right, I am talking now; you can talk later. (Some one in the gallery threw something at the speaker and said something the stenographer could not understand.) Those who want to register should certainly register, but those who know what liberty means, and I am sure there are thousands in this country,

> they will not register. (Many hurrahs and great applause.) There have been many black days, many black Fridays, and black Sundays in the history of this country. * * * But there is going to be a blacker day, not a black Friday, but a black Tuesday. (Great applause.) And I believe that those who realize the full significance of forcing a supposedly free country into an armed camp, those who realize that should put on mourning tomorrow.

At the same meeting the defendant Goldman said (R. 492):

> We say that those who believe in war, believe in conscription and in militarism and should do their duty and fight. We have no objection against it, but we refuse to be compelled to fight when we don't believe in war and when we don't believe in militarism and when we don't believe in conscription. * * *
>
> (R. 494) Now, friends, I am here frankly and openly telling you that I will continue to work against Conscription.
>
> * * * Now friends, if I do not tell you tonight not to register, it is not because I am afraid of the soldiers, or because I am afraid of the police. I have only one life to give, and if my life is to be given for an ideal, for the liberation of the people, soldiers, help yourselves. My friends, the only reason that prevents me telling you men of conscriptable age not to register is because I am an Anarchist, and I do not believe in force morally or otherwise to induce you to do anything that is against your conscience, and that is

> why I tell you to use your own judgment and rely upon your own conscience. It is the best guide in all the world. If that is a crime, if that is treason, I am willing to be shot.
>
> (R. 497) Don't forget, friends, that the opposition to conscription only begins, it does not end tonight.

The direct purpose of the league to procure as many men as possible not to register is apparent from these speeches. It is also demonstrated by the appeal for support dated May 25, 1917, which contains the following (R. 138, 455, 456, 457):

> (R. 456) * * * There are thousands of men who will not under any circumstances allow themselves to be conscripted. * * * Something must be done to sustain these men to whom the Ideal of Liberty and Human Solidarity is not a mere phrase, but a vital, living fact.
>
> With that in view, we have organized the *No-Conscription League.* Its first public activity took place on Friday evening, May 18th—a mass meeting attended by 8,000 men and women who pledged their decision not to register or to be conscripted into killing.

This was sent out to thousands of persons whose names were furnished by the defendants. Letters to those on Berkman's list were signed "Alexander Berkman"; those on Miss Goldman's list were signed in her name. (R. 30–33, 37, 38, 458, 463.)

The theory of the defendants was that they directed their efforts against conscription yet did not give advice not to register, but refused to give such

advice (R. 204); that they advised that each should do as his judgment and conscience dictated [1] (R. 60, 209, 228, 232, 252, 531). This notion is still insisted upon in defendant's brief.

According to their own confession, therefore, they did not advise obedience to the law; but that the conscientious objector should disobey, if his judgment so dictated.

Grant that defendants did distinguish between conscription and registration, the result reasonably deduced from advice not to be conscripted is to refuse to take the first step. Defendants' witness, Lind, understood Miss Goldman to say at the meeting on June 4 that all conscientious objectors would be assisted by the No-Conscription League whether they got into difficulties from refusal to register or from refusal to obey orders after registration (R. 404, 405).

But defendant's own words demolish their theory. Both distinctly and expressly solicited refusal to register. On June 2 "The Blast" was published by Berkman, and on June 1 "Mother Earth" was issued by Miss Goldman. The June "Blast" contains the following (R. 475, 476):

REGISTRATION.

> Registration is the first step of conscription. The war shouters and their prostitute press, bent on snaring you into the army, tell you

[1] At the meeting of the esoteric on May 23, Attorney Weinberger spoke. In the group there was "appreciation expressed that advice not to register would land the person so advising in jail." (R. 287.)

that registration has nothing to do with conscription.

They lie.

Without registration, conscription is impossible.

* * * * *

Every beginning is hard. But if the government can induce you to register, it will have little difficulty in putting over conscription.

By registering you wilfully supply the government with the information it needs to make conscription effective.

* * * * *

(R. 477) The consistent, conscientious objector to human slaughter will neither register nor be conscripted.

ALEXANDER BERKMAN.

* * * * *

WAR DICTIONARY

ALEXANDER BERKMAN

Allies—The fairies of Democracy.

Conscription—Free men fighting against their will.

Liberty Bond—A bone from a bonehead.

Militarism—Christianity in action.

Patriotism—Hating your neighbor.

Registration—Funeral march of Liberty.

Trenches—Digging your own grave.

The June number of "Mother Earth," published and edited by Miss Goldman (R. 112–114, 170), also speaks to the point (R. 467–473):

(R. 470) What, then, is to be done?

We can decide for no one. We do not claim omniscience, nor the gift of prophecy.

But we can point out certain self evident truths. Draw from them your own conclusions and decide your course of action. * * * There are no subtle distinctions made by liberty loving people in their objection to conscription in toto. Why, then, should there be no militant objection to the first integral part of it—REGISTRATION?

* * * * *

Registration is literal and final in its meaning. *It is the first step over the precipice into the bottomless pit of conscription.* It is the first and only step necessary toward the establishment of an institution only comparable to the now extinct Third Section of Russia. It is the resignation of the rights of the individual to a militarily supervised government. It implies the abrogation of every instinct as well as any principle you may have against bearing arms. It means that you sanction and wilfully choose obedience and that you repudiate your right to resistance. * * *

Do what your conscience dictates on June 5th and thereafter.

CONCLUSION.

The writs of error and the appeal should be dismissed or the several judgments of the courts below affirmed.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

DECEMBER, 1917.

APPENDIX "A."

STATUTES REQUIRING MILITIA SERVICE PRIOR TO THE ADOPTION OF THE CONSTITUTION.

CONNECTICUT.

Book of Gen. Laws (Green 1673, p. 49).
Acts and Laws, 1702, p. 76.
Acts and Laws, 1715, p. 78.
Acts and Laws, 1733 (Green, Laws to 1772, p. 155).
Acts and Laws, 1755 (Green, Laws to 1772, p. 277).
Acts and Laws, 1756 (Green, Laws to 1772, p. 284).
Acts and Laws, 1772 (Green, Laws to 1772, p. 373).
Acts and Laws, 1784, p. 144.

DELAWARE.

Laws of New Castle, Kent, and Sussex upon Delaware, p. 171 (1741).
Acts 1746, c. 84, Acts (Bradford, 1752), p. 301.
Act June 4, 1785, Laws 1785, p. 57.

GEORGIA.

Act Sept. 29, 1773, Colonial Records (Candler), Vol. XIX, pt. 1, p. 291.
Act Jan. 24, 1755, Colonial Records (Candler), Vol. XVIII, p. 7.
April 24, 1760, Colonial Records (Candler), Vol. XVIII, p. 426.
Act November 15, 1778, Colonial Records of Ga. (Candler), Vol. XIX, pt. 2 (1774–1805), p. 103.
Act February 26, 1784, Colonial Records (Candler), Vol. XIX, pt. 2, p. 348.

MARYLAND.

Act June 3, 1715, c. 43.
Act June 8, 1719, c. 1.
Act Nov. 3, 1722, c. 15.

Act Apr. 12, 1733, c. 7.
Laws June, 1777, c. 17.
Laws Oct., 1777, c. 21.
Laws Oct., 1778, c. 10.
Laws June, 1780, c. 3.
Laws May, 1781, c. 15.
Laws Nov., 1783, c. 1.

MASSACHUSETTS.

Act Nov. 22, 1693, c. 3, Acts and Resolves, Province of Massachusetts Bay, Vol. I, p. 128.

Act June 23, 1748, c. 7, Acts, *supra*, Vol. III, p. 420.

Act January 22, 1776, c. 10, Acts, *supra*, Vol. V, p. 445.

Act Nov. 14, 1776, c. 21, Acts and Laws 1776–1780, p. 89, Acts and Resolves, Province of Massachusetts Bay, v. 5, p. 595.

Act March 13, 1778, c. 24, Acts, *supra*, Vol. V, p. 778.

Resolve of June 12, 1778, c. 51, p. 13, May, 1778–Jan. 1781.

Resolve of June 30, 1781, c. 98, Laws and Resolves of Massachusetts, 1780–81, p. 674.

Act Mar. 3, 1781, Laws of 1781, c. 21, pp. 32.

Act Mar. 10, 1785, c. 55, Perpetual Laws 1780 to 1789, p. 338.

The following statutes provided for impressment into His Majesty's army—the statutes of 1758–9 for an expedition into Canada:

Act 1693–4, c. 4, Acts, *supra*, Vol. I, p. 133.
Act 1699–1700, c. 19, Acts, *supra*, Vol. I, p. 398.
Act 1702, c. 6, Acts, *supra*, Vol. I, p. 499.
Act 1724–25, c. 6, Acts, *supra*, Vol. II, p. 333.
Act 1744, c. 2, Acts, *supra*, Vol. III, p. 144.
Act 1748–9, c. 5, Acts, *supra*, Vol. III, p. 417.
Act 1753–4, c. 41, Acts, *supra*, Vol. III, p. 734.
Act 1755–6, c. 12, Acts, *supra*, Vol. III, p. 872.
Act 1756–7, c. 23, Acts, *supra*, Vol. III, p. 1024.
Act 1757–8, c. 34, Acts, *supra*, Vol. IV, p. 86.
Act 1758–9, c. 3, Acts, *supra*, Vol. IV, p. 157.
Act 1758–9, c. 21, Acts, *supra*, Vol. IV, p. 191

NEW HAMPSHIRE.

Province Laws, 1688, c. 18, 1 Metcalf's ed., 221.
Province Laws, 1689, c. 49, 1 *id.*, 297.
Province Laws, 1689, c. 55, 1 *id.*, 299.
Province Laws, 1689, c. 98, 1 *id.*, 318.
Province Laws, 1689, c. 117, 1 *id.*, 324.
Province Laws, 1689, c. 119, 1 *id.*, 325.
Province Laws, 1689–90, c. 234, 1 *id.*, 371.
Province Laws, 1689–90, c. 243, 1 *id.*, 376.
Province Laws, 1689–90, c. 245, 1 *id.*, 377.
Province Laws, 1689–90, c. 249, 1 *id.*, 378.
Province Laws, 1690, c. 276, 1 *id.*, 395.
Province Laws, 1690, c. 30, 1 *id.*, 413.
Province Laws, 1690, c. 87, 1 *id.*, 314.

(The above laws were enacted during the period when New Hampshire and Massachusetts were joined under one government.)

Act Oct. 6, 1703, c. 1, 2 Metcalf's ed., 55.
Act May 14, 1718, c. 21, 2 *id.*, 284.
Act May 2, 1719, c. 14, 2 *id.*, 347.
Act Feb. 25, 1739–40, c. 4, 2 *id.*, 575.
Act Feb. 28, 1745–6, c. 8, 3 *id.*, 17.
Act Sept. 19, 1776, c. 3, Metcalf's ed., v. 4, p. 39.
Act of March 18, 1780, c. 12, Metcalf's ed. Laws N. H., v. 4, p. 273, 281.

NEW JERSEY.

Act May 8, 1746, 1st sess., c. 200, Acts (Allinson, 1776), p. 139.
Act Dec. 21, 1771, 4th sess., c. 539, Acts (Allinson, 1776), p. 343.
Act March 15, 1777, c. 20, acts September, 1776, p. 26.
Act September 9, 1777, c. 44, acts September, 1777, p. 98.
Act June 2, 1779, c. 24, acts May, 1779, p. 58.
Act June 12, 1779, c. 44, acts May, 1779, p. 113.

Act of Oct. 4, 1690, Colonial Laws of New York, 1664–1719, vol. 1, p. 219.

Act May 6, 1691, c. 5, Laws, *supra*, p. 231.

Act Oct. 18, 1701, c. 95, Laws, *supra*, p. 454.

Act Nov. 27, 1702, c. 114, Laws, *supra*, p. 500.

Act June 19, 1703, c. 135, Laws, *supra*, p. 546.

Act June 27, 1706, c. 157, Laws, *supra*, p. 591.

Act Sept. 18, 1708, c. 168, Laws, *supra*, p. 611.

Act Sept. 20, 1709, c. 193, Laws, *supra*, p. 675.

Act Nov. 24, 1711, c. 235, Laws, *supra*, p. 745.

Act Dec. 10, 1712, c. 258, Laws, *supra*, p. 778.

Act July 1, 1713, c. 260, Laws, *supra*, p. 781.

Act July 5, 1715, c. 296, Laws, *supra*, p. 868.

Act June 30, 1716, c. 315, Laws, *supra*, p. 887.

Act May 27, 1717, c. 334, Laws, *supra*, p. 917.

Act July 3, 1718, c. 357, Laws, *supra*, p. 1001.

Act November 19, 1720, c. 385, Colonial Laws of New York, 1720–1737, vol. 2, p. 1.

Act July 27, 1721, c. 419, Laws, *supra*, p. 84.

Act July 24, 1724, c. 448, Laws, *supra*, p. 187.

Act Aug. 31, 1728, c. 511, Laws, *supra*, p. 421.

Act Oct. 17, 1730, c. 553, Laws, *supra*, p. 657.

Act Sept. 30, 1731, c. 563, Laws, *supra*, p. 698.

Act October 14, 1732, c. 573, Laws, *supra*, p. 734.

Act November 1, 1733, c. 598, Laws, *supra*, p. 821.

Act Nov. 13, 1734, c. 617, Laws, *supra*, p. 858.

Act Nov. 8, 1735, c. 628, Laws, *supra*, p. 905.

Act Nov. 10, 1736, c. 637, Laws, *supra*, p. 922.

Act Dec. 16, 1737, c. 647, Laws, *supra*, p. 947.

Act Oct. 3, 1739, c. 674, Colonial Laws of New York, 1739–1755, vol. 3, p. 3.

Act Nov. 3, 1740, c. 694, Laws, *supra*, p. 69.

Act Nov. 27, 1741, c. 716, Laws, *supra*, p. 168.

Act Oct. 29, 1742, c. 730, Laws, *supra*, p. 224.

Act Dec. 17, 1743, c. 747, Laws, *supra*, p. 296.

Act Sept. 21, 1744, c. 771, Laws, *supra*, p. 385.

Act Nov. 29, 1745, c. 814, Laws, *supra*, p. 510.

Act Feb. 27, 1746, c. 816, Laws, *supra*, p. 511.

Act Dec. 6, 1746, c. 843, Laws, *supra*, p. 621.
Act Sept. 22, 1747, c. 849, Laws, *supra*, p. 648.
Act Dec. 12, 1753, c. 947, Laws, *supra*, p. 962.
Act Dec. 7, 1754, c. 963, Laws, *supra*, p. 1016.
Act Feb. 19, 1755, c. 972, Laws, *supra*, p. 1051.
Act Feb. 19, 1756, c. 996, Colonial Laws of New York, 1755–1769, vol. 4, p. 16.
Act Nov. 27, 1756, c. 1024, Laws, *supra*, p. 101.
Act Feb. 26, 1757, c. 1042, Laws, *supra*, p. 178.
Act Dec. 24, 1757, c. 1048, Laws, *supra*, p. 187.
Act Dec. 16, 1758, c. 1070, Laws, *supra*, p. 293.
Act Dec. 24, 1759, c. 1092, Laws, *supra*, p. 363.
Act Nov. 8, 1760, c. 1128, Laws, *supra*, p. 475.
Act Dec. 31, 1761, c. 1157, Laws, *supra*, p. 553.
Act Dec. 11, 1762, c. 1186, Laws, *supra*, p. 636.
Act Dec. 13, 1763, c. 1211, Laws, *supra*, p. 698.
Act Oct. 20, 1764, c. 1241, Laws, *supra*, p. 767.
Act Dec. 23, 1765, c. 1275, Laws, *supra*, p. 852.
Act Dec. 19, 1766, c. 1303, Laws, *supra*, p. 915.
Act Dec. 24, 1767, c. 1326, Laws, *supra*, p. 952.
Act March 24, 1772, c. 1541, Colonial Laws of NewYork, 1769–1775, vol. 5, p. 342.
Act April 1, 1775, c. 1700, Laws, *supra*, p. 732.
Act Mar. 31, 1778, c. 22, Laws, 1777–84 (ed. 1886), vol. 1, p. 45.
Act April 3, 1778, c. 33, Laws, *supra*, p. 62.
Act March 13, 1779, c. 33, Laws *supra*, p. 136.
Act October 9, 1779, c. 13, Laws *supra*, p. 157.
Act March 11, 1780, c. 53, Laws *supra*, p. 232.
Act March 11, 1780, c. 55, Laws *supra*, 3rd sess., p. 237.
Act Sept. 29, 1780, Laws *supra*, 4th sess., c. 4, p. 295.
Act March 10, 1781, c. 23, Laws *supra*, p. 336.
Act July 1, 1781, Laws *supra*, p. 393, 4th sess., c. 60.
Act Nov. 17, 1781, Laws *supra*, p. 410, 5th sess., c. 8.
Act April 4, 1782, Laws *supra*, p. 440, 5th sess., c. 27.
Act February 21, 1783, Laws *supra*, p. 529, 6th sess., c. 16.
Act April 4, 1786, c. 25, vol. 2, Laws, (ed. 1886) p. 220.

NORTH CAROLINA.

Laws 1715, c. 25, vol. 23 State Records, p. 29.
Laws 1746, c. 1, vol. 23 S. R., p. 244.
Laws 1760, c. 2, vol. 23 S. R., p. 518.
Laws 1764, c. 1, vol. 23 S. R., p. 596.
Laws April, 1777, c. 1, vol. 24 S. R., p. 1.
November, 1777, c. 15, c. 19, vol. 24 S. R., *supra*, pp. 113, 128.
April, 1778, third session, c. 1, vol. 24 S. R., *supra*, p. 190; c. 2, p. 198.
May, 1779, first session, c. 1, vol. 24 S. R., *supra*, p. 254.
Laws 1780, c. 24, vol. 24 S. R., p. 335.
Laws 1780, third session, c. 1, vol. 24 S. R., p. 358.
Laws 1781, first session, c. 1, vol. 24, S. R., p. 384.
Laws 1781, c. 10, vol. 24, S. R., p. 404.
Laws 1785, c. 1, vol. 24 S. R., p. 711.
Laws 1786, c. 22, vol. 24 S. R., p. 813.

PENNSYLVANIA.

Resolve, Sept. 14, 1776, v. 9, St. L., p. 567.
Act Feb. 14, 1777, c. 742, v. 9 St. L., p. 49 (see opinion of Judge Read in Kneedler v. Lane, 45 Pa. St., 286).
Act March 17, 1777, c. 750, v. 9 St. L., p. 75.
Act Dec. 30, 1777, c. 781, v. 9 St. L., p. 185
Act April 5, 1779, c. 843, v. 9 St. L., p. 381.
Act October 10, 1779, c. 865, v. 9 St. L., p. 440.
Act March 20, 1780, v. 10 St. L., c. 92, pp. 144, 156–7.
Act Sept. 28, 1781, v. 10 St. L., c. 950, p. 361.
Act March 21, 1783, c. 1022, 11 St. L., p. 91.
Act Sept. 22, 1783, c. 1038, 11 St. L., p. 161.
Act March 22, 1788, c. 1339, v. 13 St. L., p. 41.

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Act May 19, 1647, 1 Colonial Records, 153.
Act May 13, 1665, 2 *id.* 115.
Act. Aug. 13, 1673, 2 *id.* 495, 498; Laws 1673, p. 49
Act June 30, 1676, 2 *id.* 549.
Act May 1, 1677, 2 *id.* 567.
Act May 7, 1701, 3 *id.* 430.

Act May 6, 1702, 3 *id.* 453, Laws 1702, p. 76.
Laws May, 1718, *id.* Franklin, 1730, p. 96.
Act June 14, 1726, 4 Colonial Records, p. 377.
Acts and Laws 1730, p. 90.
Acts and Laws 1744, p. 66.
Act. March 14, 1757, 6 Colonial Records, p. 34.
Act August 10, 1757, 6 *id.* 75.
Acts and Laws 1767, p. 179.
Laws, June, 1775, p. 78.
Act April 17, 1777, 8 Colonial Records, p. 197.
Laws, October, 1777, p. 14.
Laws, December, 1777, p. 10.
Laws, June, 1778, p. 10.
Laws, October, 1779, p. 29.
Laws, Feb., 1781, pp. 5–8.
Laws, May, 1781, 2d sess., p. 11.
Laws, Aug., 1781, p. 39.

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Act Oct. 15, 1686, No. 30, 2 St. L. 15.
Act May 8, 1703, No. 206, 9 St. L. 617.
Act July 19, 1707, No. 270, 9 St. L. 625.
Act Sept. 2, 1721, No. 440, 9 St. L. 631.
Act May 30, 1734, No. 584, 9 St. L. 641.
Act April 3, 1739, No. 653, 9 St. L. 641.
Act June 13, 1747, No. 748, 9 St. L. 645.
Act March 28, 1778, No. 1076, 9 St. L. 666, 674, sec. 15.
Act Feb. 13, 1779, No. 1116, 4 St. L. 465.
Act Feb. 19, 1779, No. 1120, 4 St. L. 470.
Act Sept. 11, 1779, No. 1137, 4 St. L. 502.
Act Feb. 3, 1780, No. 1140, 4 St. L. 504.
Act Feb. 6, 1782, No. 1143, 4 St. L. 508.
Act Feb. 26, 1782, No. 1154, 9 St. L. 682.
Act March 17, 1783, No. 1188, 4 St. L. 567.
Act March 26, 1784, No. 1233, 9 St. L. 689.

October, 1705, 3 Hening's Va. Stat. L., p. 335; p. 362.
May, 1723, 4 *id.*, p. 118.
February, 1727, 4 *id.*, p. 197.
November, 1738, 5 *id.*, p. 16.
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October, 1748, 6 *id.*, p. 112.
August, 1755, 6 *id.*, p. 521.
August, 1755, 6 *id.*, p. 530.
March, 1756, 7 *id.*, pp. 9, 14.
March, 1756, 7 *id.*, p. 26, 31.
April, 1757, 7 *id.*, p. 93.
April, 1757, 7 *id.*, p. 106.
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November, 1762, 7 *id.*, p. 536.
November, 1766, 8 *id.*, p. 241.
July, 1771, 8 *id.*, p. 503.
July, 1775, c. 1, 9 Hening's St. L., p. 9.
December, 1775, c. 1, 9 Hening's, pp. 75, 89.
May, 1776, c. 12, 9 Hening's, p. 139.
May, 1777, c. 1, 9 Hening's, p. 267.
May, 1777, c. 7, 9 Hening's, p. 291.
May, 1781, c. 8, 10 Hening's, pp. 416, 421.
October, 1784, c. 28, 11 Hening's, p. 475.
October, 1785, c. 1, 12 Hening's, p. 9.

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APPENDIX "B."

DRAFT ACTS OF THE ORIGINAL STATES TO RECRUIT THE CONTINENTAL ARMY.

GEORGIA.

Act Aug. 5, 1782, Colonial Records, ed. Candler, v. 19, pt. 2, p. 155.

MARYLAND.

Laws March, 1778, c. 5, secs. 6 and 15.
Act Oct. 1780, c. 33, sec. 2.
Act Oct. 1780, c. 43, secs. 6 and 19.
Act May, 1781, c. 15, sec. 7.
Act Nov. 1781, c. 28, secs. 14 to 16.

MASSACHUSETTS.

Resolve June 16, 1781, c. 38, Laws and Resolves, 1780–1781, p. 621.

NEW HAMPSHIRE.

Act January 18, 1777, c. 5, Metcalf's ed. vol. 4, Laws, p. 77.
Act of June 26, 1779, c. 10, Laws, *supra*, p. 219.
Act June 16, 1780, c. 3, Laws, *supra*, p. 293.
Act June 27, 1780, c. 13; Laws, *supra*, 304.

NEW YORK.

Act April 1, 1778, c. 28, Laws of N. Y. v. 1, 1777–1784, p. 51.
Act of March 13, 1779, c. 33, Laws *supra*, p. 136, 137.
Act of July 1, 1780, c. 78, Laws *supra*, p. 284.
Act of July 1, 1781, 4th sess. c. 60, Laws *supra*, p. 393.
Act Mar. 23, 1782, 5th sess. c. 22, Laws *supra*, p. 433.

NORTH CAROLINA.

Laws November, 1777, c. 19, State Records, vol. 24, p. 128.

Laws of April, 1778, 1st sess., c. 1, State Records, vol. 24, p. 154.

Laws of November, 1779, c. 1, State Records, vol. 24, p. 262.

Laws 1781, c. 1, State Records, vol. 24, p. 362; c. 10, State Records, vol. 24, p. 404.

RHODE ISLAND.

Act July, 1780, 1st sess., pp. 6–10.
Act July, 1780, 2d sess., p. 27.
Act July, 1780, 2d sess., pp. 28–34.
Act November, 1780, p. 35.
Act January, 1781, p. 15.
Act March, 1781, p. 41.

SOUTH CAROLINA.

1778, v. 4, St. L., p. 410, No. 1075. Amended by act of October 9, 1778, No. 1103, 4 Stat. 453.

VIRGINIA.

Act May, 1777, c. 2, 9 Hen. 276–277.
Act October, 1777, c. 1, 9 Hen. 338–341.
Act October, 1778, c. 45, 9 Hen. 588.
Act May, 1779, c. 19, 10 Hen. 82
Act October, 1779, c. 50, 10 Hen. 214.
Act May, 1780, c. 12, 10 Hen. 259.
Act October, 1780, c. 3, 10 Hen. 326, 333.
Act May, 1782, c. 3, 11 Hen. 14.

APPENDIX "C."

STATUTES NOW IN FORCE IN THE STATES AND TERRITORIES IMPOSING COMPULSORY MILITIA SERVICE.

Statutes in the following States and Territories impose on the citizens thereof between the ages of 18 and 45 liability to service in the respective militias either by draft or otherwise.

Alaska, 31 Stat., 321, 322, c. 786, sec. 2.

Arkansas, Kirby & Castle Digest, 1916, c. 121, secs. 6234, 6235, 6240, pp. 1484, 1485.

California, Kerr's Cum. Supp., 1906–1913, secs. 1897, 1906, 1917, pp. 245, 247–8.

Connecticut, Pub. Acts, 1917, act March 8, 1917, secs. 1, 3, 4, 5, pp. 2225–2226.

District of Columbia, 25 Stat., 772–3, c. 328, secs. 1, 5, act March 1, 1889.

Georgia, Laws 1916, secs. 5, 9, pp. 159–60.

Idaho, Session Laws 1909, Senate Bill No. 75, secs. 1, 2, 3, 47, pp. 342, 343, 357.

Illinois, Laws 1917, p. 784; see Laws 1909, act June 10, 1909, p. 437, sec. 3.

Iowa, Code 1897, secs. 2167, 2169, p. 770.

Kentucky, Acts 1916, c. 43, secs. 2, 7, 109, 118, pp. 437, 440, 472, 476–7.

Louisiana, Acts 1912, No. 191, sec. 1, p. 337; Acts 1915–16, No. 264, secs. 9, 70, pp. 542, 548.

Maine, R. S. 1916, c. 15, secs. 1, 2, 10, pp. 296–7, 299.

Maryland, Anno. Code, (Bagby), vol. 2, art. 65, secs. 1, 2, 8, pp. 1476, 1478.

Michigan, Howell's Mich. Stats., vol. 1, 2d Ed., secs. 1588, 1590, pp. 712, 714.

Minnesota, Sess. Laws 1916–17, c. 400, secs. 2, 7, pp. 587–8.

Mississippi, Laws 1916, c. 245, secs. 1, 3, p. 383.

Montana, Rev. Codes, Supp. 1915, secs. 1045a, 1054, pp. 163, 165.

Nebraska, R. S. 1913, c. 41, secs. 3899, 3904, 3913, 3915, pp. 1114–15, 1118, 1119.

Nevada, Rev. Laws 1912, vol. 1, secs. 3982, 3984, 3986, 3998, pp. 1156–7, 1159.

New Hampshire, Pub. Acts. & Res. 1917, c. 123, secs. 1, 6, 29, pp. 52, 53, 55.

New Jersey, Comp. Stat. 1709–1910, vol. 3, pp. 3347–8, secs. 1, 2, 8, 9.

New Mexico, Statutes 1915, secs. 3810–11, 3815–16, pp. 1114, 1116.

New York, Consol. Laws 1909, vol. 3, pp. 2468–9, 2471–2, secs. 1, 2, 8, 9; Laws 1916, 139th sess., vol. 3, c. 568, secs. 9, 9a, pp. 1862–3.

North Carolina, Laws 1917, c. 200, secs. 1, 46, 47, 48, pp. 351, 360–1.

North Dakota, Comp. Laws, 1913, v. 1, c. 35, secs. 2347–8, 2353–4, pp. 568–9.

Oklahoma, Rev. Laws 1910, vol. 1, c. 46, secs. 3898–3900, 3904, 3906, 3908, pp. 1015, 1017, 1018.

Oregon, Gen. Laws, 1917, c. 327, secs. 1, 3, 13, 88, pp. 654–5, 657, 680.

Rhode Island, Gen. Laws 1909, Title XL, secs. 1, 136, 138, pp. 1364, 1388–9.

South Carolina, Code 1912, vol. 1, secs. 490, 494, 495, pp. 174, 175.

South Dakota, Comp. Laws 1913, vol. 1, pp. 621–2, secs. 1–4.

Tennessee, Thompson's Shannon's Code 1917, vol. 1, secs. 643a–643a–5, pp. 296–298.

Utah, Laws 1917, c. 99, secs. 1, 2, 3, 18, 19, 20, pp. 289, 290, 295–6.

Vermont, Laws 1917, act March 3, 1917, No. 168, secs. 1, 47, pp. 176, 185.

Washington, Laws 1917, c. 107, secs. 1, 9, pp. 361, 364–5.

West Virginia, Code 1906, secs. 571–2, 574, pp. 229–30.

Wyoming, Session Laws 1917, act February 21, 1917, c. 107, secs. 1, 20, pp. 168, 174.

APPENDIX "D."

MONROE'S LETTER OF OCTOBER 17, 1814, ON THE DRAFT BILL.

On October 17, 1814, Hon. James Monroe, then Secretary of War, addressed Hon. G. M. Troup, chairman of the Military Committee, House of Representatives, on the bill to increase the Military Establishment by draft. Excerpts from the letter, to be found in Niles' Weekly Register, vol. 7, page 137, are as follows:

Nor does there appear to be any well founded objection to the right in congress to adopt this plan (draft upon classes), or to its equality in its application to our fellow-citizens individually. Congress have a right, by the constitution, to raise regular armies, and no restraint is imposed in the exercise of it, except in the provisions which are intended to guard generally against the abuse of power, with none of which does this plan interfere. It is proposed, that it shall operate on all alike, that none shall be exempted from it except the chief magistrate of the United States, and the governors of the several states.

It would be absurd to suppose that congress could not carry this power into effect, otherwise than by accepting the voluntary service of individuals. It might happen that an army could not be raised in that mode, whence the power would have been granted in vain. The safety of the state might depend on such an army. Long continued invasions conducted by regular well disciplined troops, can best be repelled by troops kept constantly in the field, and equally well disciplined. Courage in an army is in a great measure mechanical. A small body well trained, accustomed to action, gallantly led on, often breaks three or four times the number of more respectable and more brave, but raw and undisciplined troops. The sense of danger is diminished by frequent exposure to it without harm: and confidence, even in the timid, is inspired in the knowledge that reliance may be placed on others, which can grow up only by service together. The grant to congress to raise armies was made with a knowledge of all these circumstances, and with the intention that it should take effect. The framers of the constitution, and the states who ratified it, knew the advantage

which an enemy might have over us, by regular forces, and intended to place their country on an equal footing.

The idea that the United States cannot raise a regular army in any other mode than by accepting the voluntary service of individuals, is believed to be repugnant to the uniform construction of all grants of power, and equally so to the first principles and leading objects of the federal compact. An unqualified grant of power gives the means necessary to carry it into effect. This is an universal maxim which admits of no exception. Equally true is it that the conservation of the state is a duty paramount to all others. The commonwealth has a right to the service of all its citizens, or rather, the citizens composing the commonwealth have a right collectively and individually to the service of each other, to repel any danger which may be menaced. The manner in which the service is to be apportioned among the citizens, and rendered by them, are objects of legislation. All that is to be dreaded in such case, is the abuse of power, and happily our constitution has provided ample security against that evil.

In support of this right in congress, the militia service affords a conclusive proof and striking example. The organization of the militia is an act of public authority, not a voluntary association. The service required must be performed by all, under penalties which delinquents pay. The generous and patriotic perform them cheerfully. In the alacrity with which the call of the government has been obeyed, and the cheerfulness with which the service has been performed throughout the United States by the great body of the militia, there is abundant cause to rejoice in the strength of our republican institutions, and in the virtue of the people.

The plan proposed is not more compulsive than the militia service, while it is free from most of the objections to it. The militia service calls from home for long terms whole districts of country. None can elude the call. Few can avoid the service, and those who do are compelled to pay great sums for substitutes. This plan fixes on no one personally, and opens to all who chose it a chance of declining the service. It is a principal object of this plan to engage in the defence of the state the unmarried and youthful, who can best defend it and best be spared, and to secure to those who render this important service, an adequate compensation from the voluntary contribution of the more wealthy in every class. Great confidence is entertained that such contribution will be made in time to avoid a draft. Indeed it is believed to be the necessary and inevitable tendency of this plan to produce that effect.

The limited power which the United States have in organizing the militia may be urged as an argument against their right to raise regular troops in the mode proposed. If any argument could be drawn from that circumstance, I should suppose that it would be in favor of an opposite conclusion. The power of the United States over the militia has been limited, and that for raising regular armies granted without limitation. There was, doubtless, some object in this arrangement. The fair inference seems to be, that it was made on great consideration, that the limitation in the first instance was intentional, the consequence of the unqualified grant of the second.

But it is said that by drawing the men from the militia service into the regular army, and putting them under regular officers, you violate a principle of the constitution which provides that the militia shall be commanded by their own officers. If this was the fact the conclusion would follow. But it is not the fact. The men are not drawn from the militia, but from the population of the country: when they enlist voluntarily, it is not as militia men that they act, but as citizens. If they are drafted it must be in the same sense. In both instances they are enrolled in the militia corps, but that, as is presumed, cannot prevent the voluntary act in one instance, or the compulsive in the other. The whole population of the United States within certain ages belong to these corps. If the United States could not form regular armies from them they could raise none. (pp. 139, 140.)

These plans (the draft) are thought more deserving the attention of the committee than any that have occurred. The first, for the reasons stated, is preferred. It is believed that it will be found more efficient against the enemy, less expensive to the public, and less burthensome on our fellow-citizens.

It has likewise the venerable sanction of our revolution. In that great struggle resort was had to this expedient for filling the ranks of our regular army, and with decisive effect.

It is not intended by these remarks, should the first plan be adopted, to dispense altogether with the service of the militia. Although the principal burthen of the war may thereby be taken from the militia, reliance must still be placed on them for important aids, especially in cases of sudden invasion. (pp. 140, 141.)

APPENDIX "E."

ANCIENT ENGLISH STATUTES PROVIDING FOR MILITARY SERVICE.

1 Edward III, stat. 2, c. 5 (A. D. 1325), 1 Stat. L., England, pp. 415-416:

Item, the King will that no man from henceforth shall be charged to arm himself, otherwise than he was wont in the time of his progenitors Kings of England; (2) and that no man be compelled to go out of his shire but where necessity requireth, and suddain coming of strange enemies into the realm; and that it shall be done as hath been used in times past for the defence of the realm.

1 Edward III, stat. 2, c. 7 (A. D. 1327), 1 Stat. L., England, p. 416:

Item, Whereas Commissions have been awarded to certain people of shires to prepare men of arms, and convey them to the King into Scotland or Gascoign, or elsewhere, at the charge of the shires; (2) the King hath not before this time given any wages to the said preparers and conveyers, nor soldiers whom they have brought, whereby the commons of the counties have been at great charge, and much impoverished; (3) the King will that it shall be done so no more.

18 Edward III, stat. 2, c. 7, 2 Stat. L., England, p. 13 (A. D. 1344):

(4) And that men of arms, hoblers, and archers, chosen to go in the King's service out of England, shall be at the King's wages from the day that they depart out of the counties where they were chosen, till their return.

25 Edward III, stat. 5, c. 8 (A. D. 1350), 2 Stat. L., England, p. 55:

Item, it is accorded and assented, that no man shall be constrained to find men of arms, hoblers, nor archers, other than those which hold by such services, if it be not by common assent and grant made in parliament.

The Statutes 1 Edward 3, 18 Edward III, and 25 Edward III above were confirmed in 4 Henry IV, c. 13, 2 Stat. L., England, p. 434 (A. D. 1402).

16 Car. I, c. 28, 5 Stat. Realm, 138, entitled "An Act for the better raising and levying of Souldiers for the present defence of the Kingdoms of England and Ireland" (A. D. 1640).

Forasmuch as great Commotions and (Rebellions) have beene lately raised and stirred up in his Majesties Kingdome of Ireland by wicked plots and conspiracies of diverse of his Majesties Subjects there (being traiterously affected) to the great endangering not onely of the said Kingdome but alsoe of this Kingdom of England unlesse a speedy course be taken for the preventing thereof and for the raising and pressing of men for those services And Whereas by the Laws of this Realm none of his Majesties Subjects ought to be (impressed) or compelled to go out of his county to serve as a souldier in the Wars except in case of necessitie of the sudden coming in of strange enemies into the Kingdom or except they be otherwise bound by the tenure of theire lands or possessions Therefore in respect of the great and urgent necessity of providing a present supply of men for the preventing of these great and imminent dangers and for the speedie suppressing of the said hainous and dangerous Rebellions. Be it enacted by authority of this psent Parliament that the Justices of the Peace of every County and Riding within this Realm * * * shall * * * raise levie and impresse so many men (for) Souldiers Gunners and Chirrugions as shall be appointed by order of the Kings Majestie his heires or successors and both Houses of Parliament for the said services and to command all and every the high Constables * * * to bring before them any such person or persons as shall be fit and necessary for the said services which said persons soe to be imprested as aforesaid and every of them shall have such imprest money * * * and such other necessary charges and allowances shall be made touching the said presse the said money and other charges and allowances to be paid by such persons and in such manner as by order of his Majesty his heires and succesors and of both Houses of Parliament shall be appointed And if any person or persons shall willfully refuse to be imprested for the said services that then it shall and may be lawfull to and for the said persons soe authorized as aforesaid to the said presse to commit such offender to prison. * * *

○

DEC 10 1917
JAMES D. MAHER,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

656 Ruthenberg *v.* United States.
663 Arver *v.* United States.
664 Grahl *v.* United States.
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702 Goldman *et al.* *v.* United States.
738 Jones *v.* Perkins.

CASES INVOLVING THE CONSTITUTIONALITY OF THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE DRAFT ACT.

MOTION FOR LEAVE TO FILE THE FOLLOWING BRIEF PREPARED BY HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIÆ AND AS COUNSEL FOR ROBERT COX, WHO, AS A MEMBER OF THE NATIONAL MILITIA, HAS BEEN CONSCRIPTED UNDER SAID ACT, AND AS SUCH IS NOW IN TRAINING AT CAMP FUNSTON, KANSAS, FOR MILITARY SERVICE BEYOND THE TERRITORIAL LIMITS OF THE UNITED STATES. COX, A NATIVE-BORN AMERICAN YOUTH, AFTER AFFIRMING THE VALIDITY OF THE ACT, AND EXPRESSING HIS WILLINGNESS TO SERVE HIS COUNTRY AT HOME, APPEALS TO THE COURT BY HABEAS CORPUS TO SECURE TO HIM THE EXEMPTION FROM SERVICE ABROAD EXPRESSLY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

PRESS OF GIBSON BROTHERS, INC., WASHINGTON, D. C.

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Cases involving the constitutionality of the Act of May 18, 1917, generally known as the Draft Act.

MOTION OF HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIÆ, AND AS COUNSEL FOR ROBERT COX, FOR LEAVE TO FILE A BRIEF IN SAID CAUSES.

Now come Hannis Taylor and Joseph E. Black, members of the bar of this Court, as Amici Curiæ, and as counsel for Robert Cox, whose petition for *habeas corpus* is now pending in the District Court of the United States for the District of Kansas, at Kansas City, in said District, where it has been set for hearing on December 8, 1917, before the Honorable John C. Pollock, the Judge of said Court. A copy of said petition is hereto annexed as Appendix A. Upon its face it appears that the petitioner, a native born citizen of Richmond, Missouri, after being being duly conscripted under the terms of said Act as a

member of the National Militia, has been placed for military training in Camp Funston, situated in the counties of Geary and Riley in said State of Kansas, where he is to be held in military custody by General Leonard Wood until some time in the near future, when he is to be transferred to the battlefields of Europe, presumably to France. Said petitioner, after affirming the constitutionality of said Act of May 18, 1917, and expressing his willingness to serve under it as a member of said National Militia whenever it is called upon "to execute the laws of the Union, suppress insurrections and repel invasions," sets up the constitutional immunity or exemption from military service beyond the territorial limits of the United States, guaranteed to him, in express terms, by the Constitution of the United States. As petitioner is informed by counsel that his right to such constitutional exemption or immunity depends upon whether or no he is a member of the National Militia called forth by Congress "to execute the laws of the Union, suppress insurrections and repel invasions," his case must be won or lost by the conclusions this Court may reach as to the constitutional powers of Congress to legislate upon this subject matter in the above stated cases to be argued on or about the 10th of December. His counsel therefore move this Honorable Court to permit them to file the brief hereto annexed in his behalf in the above stated causes. It is the purpose of counsel to make the case of Robert Cox a test case on this vitally important question. If his petition for *habeas corpus* is denied by the District Court of Kansas, his case will, with all convenient speed, be brought to this Court by a direct appeal.

Entirely apart from the foregoing ground the undersigned move the Court for leave to file the brief annexed hereto as *Amici Curiæ* under the general discretion defined by it in Northern Securities Company *v.* United

States, 191 U. S. 555, in these terms: "And doubtless it is within our discretion to allow it [the filing of a brief by an *amicus curiæ* in a pending cause] *in any case when justified by the circumstances.* Green *v.* Biddle, 8 Wheat. 17; Florida *v.* Georgia, 17 How. 491; the Gray Jacket, 5 Wall. 370." As this Court knows, hundred of thousands, perhaps millions, of the younger citizens of the United States are vitally interested in the constitutional exemption or immunity set up by Robert Cox. His case therefore affects a large part of our population; it is of supreme interest to countless American households. Certainly such a nation-wide question should not be passed upon by this Court, even indirectly, without the most exhaustive argument, oral and written, at its bar. Therefore the undersigned appeal to the broad discretion of this Court, *entirely apart from any consent of counsel in pending cases,* to permit them to file the brief annexed hereto, not only as counsel for Robert Cox, but as *Amici Curiæ* for the hundreds of thousands of American citizens standing in his shoes.

HANNIS TAYLOR,
JOSEPH E. BLACK,
As Counsel for Robert Cox
and as Amici Curiæ.

APPENDIX A.

PETITION FOR WRIT OF HABEAS CORPUS.

In the District Court of the United States for the District of Kansas.

UNITED STATES OF AMERICA.

In the matter of Robert Cox, Ray County, Missouri, unlawfully detained and restrained of his liberty at Camp Funston in the Counties of Geary and Riley in the State of Kansas, by General Leonard Wood, the military commander thereof—the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

Your petitioner, Robert Cox, humbly petitioning, showeth unto the Court as follows:

1. That your petitioner, having been born in the State of Missouri on the 31st day of August, 1895, is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed, as he is informed and believes, under that part of Sec. 8, Art. I, of the Constitution of the United States which provides that "The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia, for any one or all of the three purposes which the Constitution specifies.

2. That your petitioner further avers that he is advised and believes, and so charges, that he cannot be lawfully called upon to serve for any other purposes, that he cannot

be lawfully called upon as one conscripted under said Act to render military service beyond the territorial limits of the United States. Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said drafted National Militia "across the seas;" neither has it manifested any consciousness, by any positive utterance, that any such unprecedented act would be attempted by any one. Petitioner avers that in what is known as his Flag Day address, the President of the United States solemnly and truthfully declared that "American armies were never before sent across the seas."

3. That it is the constitutional right and immunity of your petitioner to be exempt, as a member of said conscripted National Militia, from service beyond the territorial limits of the United States, because, as he is informed and believes, and so charges, that such constitutional right and immunity, solemnly defined in Sec. 8, Art. I, of the Constitution, was recognized and affirmed by the Supreme Court of the United States in 1827; by Attorney General Wickersham in an official opinion, dated February 17, 1912, and by President Wilson, in four speeches delivered in January and February, 1916.

4. That despite such constitutional right and immunity from service abroad, your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States, for the express, declared and unlawful purpose of being transported to the battlefields of Europe in open defiance of the Constitution of the United States. As early as July 16, 1917 (see Congressional Record of July 20, 1917, pp. 5864–5), the Secretary of War made a formal declaration

of the fact that not only the State Militia (now called the National Guard), but also the National Militia (now called the National Army) were to be sent to France with all convenient speed. Among other things the Secretary of War then said: "It is intended to send the National Guard, or such units thereof as are properly equipped and trained, to join the American expeditionary force in France before the additional forces authorized by the act above, now called the National Army, can be sent. When the plans for mobilizing these two forces were drawn it was not known how soon the National Army could be assembled under the draft." Your petitioner avers that since that date the conscripted National Militia (now called the National Army in order to conceal its real character) has been duly drafted, and is now being concentrated in camps to be therein detained for a few months prior to its transportation to the battlefields of Europe, under purely executive orders, to be made in open defiance of the Constitution of the United States. Your petitioner further avers that neither the American electorate nor the American Congress has ever spoken one word, indicating the desire, that the National Militia should be sent to the battlefields of Europe. Neither the electorate nor the Congress has authorized the Executive power to make any such order or orders, expressly forbidden by the Constitution of the United States.

5. That your petitioner is now unlawfully detained and restrained of his liberty at Camp Funston by the military power of the United States, because he is so detained and restrained for the sole, only and declared purpose of being transported very soon to the battlefields of Europe, under void Executive orders to be made by the Secretary of War in open defiance of the Constitution of the United States. That your petitioner will surely be so transported unless he is delivered by the order of this Honorable Court from such unlawful custody. Your petitioner further

avers that as the military commander of said Camp Funston is now General Leonard Wood, your petitioner is now detained by General Leonard Wood and restrained by him in the manner above set forth.

Wherefore, in consideration of the premises, your petitioner prays that a writ of habeas corpus may be granted and issued forthwith to the said General Leonard Wood, directing him to bring and have the body of your petitioner before this Honorable Court, or any Judge thereof, at a time and place in said writ to be specified to do and receive what shall then and there be considered by the Court concerning the time and cause of detention of your petitioner, and concerning the said writ, and that your petitioner may be restored to his liberty. And for such other and further relief as the nature of the petition may require.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Attorneys for Petitioner.

(Signed) ROBERT COX,
Petitioner.

STATE OF KANSAS
COUNTY OF RILEY } *ss.*

Robert Cox, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, and that he has read the same; that the matters and things therein alleged are true, except as to matters and things as are therein stated to be alleged on information and belief, and that, as to such, he believes them to be true.

(Signed) ROBERT COX.

Subscribed and sworn to before me this 2d day of November, 1917.

My term will expire March 22, 1921.

(Signed) T. W. SCOTT,
Notary Public.

[SEAL]
T. W. SCOTT, *Notary Public,*
Riley County, Kansas.

NOTICE

To the Honorable, the Attorney General of the United States; to the Honorable, the Solicitor General of the United States, Washington, D. C.; to C. S. Darrow, Chicago, Ill., Latimer & Latimer, Minneapolis, Minn.; H. F. O'Neill, 140 Nassau Street, New York; J. Gordon Jones, Cordele, Ga.

You are hereby notified that the undersigned, as counsel for Robert Cox, and as *Amici Curiæ*, on Monday, the 10th day of December, 1917, will on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit the foregoing motion to grant to them leave to file in the above stated causes numbered 656, 663, 664, 665, 666, 680, 681, 702, 738, in which you are counsel of record, a brief as counsel for Robert Cox and as *Amici Curiæ* for the reasons stated in the foregoing motion.

HANNIS TAYLOR,
JOSEPH E. BLACK.

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

. . . . . .

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

. . . . . .

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

656. Ruthenberg *v.* United States.
663. Arver *v.* United States.
664. Grahl *v.* United States.
665. Wangerin *v.* United States.
666. Wangerin *v.* United States.
680. Kramer *v.* United States.
681. Kramer *v.* United States.
702. Goldman, *et al.*, *v.* United States.
738. Jones *v.* Perkins.

Brief offered by Hannis Taylor and Joseph E. Black, members of the Bar of this Court, as amici curiæ, concerning the constitutional questions involved in these cases, arising, as they do, out of the Act of May 18, 1917, generally known as the Draft Act, leave having been asked to file such brief for the reasons stated in the foregoing motion.

IS THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE DRAFT ACT, A CONSTITUTIONAL AND VALID LAW?

Since the foundation of this Government only two conscription acts have been enacted by the Congress of the United States; the first, the Act of March 3, 1863, entitled, "*An Act for enrolling and calling out the National Forces, and for other purposes;*" the second, the Act of May 18, 1917, entitled, "*An Act to authorize the President*

to increase temporarily the Military Establishment of the United States." For the convenience of the Court these acts—the only two conscription acts ever enacted by the Congress of the United States—have been printed in parallel columns in Appendix B hereto. In the preamble of the Act of March 3, 1863, the clear and positive declaration is made that it was enacted under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections and repel invasions.*" The terms of the preamble are these:

> Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government to SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore, etc.

So clear was it to the jurists and statesmen of that epoch that the Congress, when it deems it necessary, under Section 8, Article I, of the Constitution, to call forth the *National Militia* (it can call forth no other) "to execute the laws of the Union, suppress insurrections and repel invasions," *may do so by conscription*—no real contest of the right was made by any one. Certainly no attempt was ever made to challenge the constitutionality of the Conscription Act of March 3, 1863, in this Court.

ACT OF MAY 18, 1917, A SUBSTANTIAL REPRODUCTION OF THE ACT OF MARCH 3, 1863, SO FAR AS CONSCRIPTION IS CONCERNED. It is certainly a notable fact that the *National Militia*—a creation of the Federal Convention of 1787—was never called into existence until the Act of March 3, 1863, "called it forth" by conscription. An *insurrection* had to be put down; the regular army of the United States, resting exclusively on the volunteer principle, and the systems of state militia, resting on the same principle, were inadequate to the occasion. The contingency contemplated by Section 8, Article I, had arrived. The *National Militia* was therefore called out to *put down an insurrection*. After the lapse of fifty-four years the *National Militia* was called forth *a second time* by the Conscription Act of May 18, 1917, "to execute the laws of the Union, suppress insurrections and *repel invasions*." Is it strange that, under such circumstances, the Congress, *with only one precedent of conscription to guide it*, should have made the Act of May 18, 1917, a substantial reproduction of the Act of March 3, 1863, *so far as conscription is concerned?* That all important *record fact* is manifest on the face of the two acts printed in parallel columns in Appendix B. The absence of a preamble in the Act of May 18, 1917, in nowise weakens the fact its subject-matter so clearly establishes. *The Court will observe that the act last named never intimates, directly or indirectly, in any part of it that the conscripts who are "called forth" by it are to be used outside of the territorial limits of the United States.* It does not attempt to authorize such a use, or to vest in the President the power so to employ them. No one, therefore, has the right to charge or even to intimate that when Congress called forth the *National Militia* by conscription in the Act of May 18, 1917, it had the slightest idea that it would be used for any except the three purposes expressly defined in Section 8, Article I. The pur-

pose of this brief is to demonstrate (1) that the Conscription Act in question is constitutional and valid because it was enacted by Congress, as the Act of March 3, 1863, was enacted, under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" (2) that if such Act of May 18, 1917, can not be upheld by virtue of that clause, it is null and void.

THE MILITIA AS A NATIONAL DEFENSE FORCE THE OLDEST ELEMENT IN THE ENGLISH CONSTITUTIONAL SYSTEM.

The ancient landfyrd, the militia of the English shire, is as old as the shire system itself. From the earliest times in England the obligation of military service for the protection of the State rested upon every freeman, *who could be forced to perform it by law.* That obligation was embodied in the inevitable *trinoda necessitas*, which consisted of military service in the field, and in the repair of bridges and fortresses. "This common burden was the *trinoda necessitas* in its origin required of all people, not resting on land, and therefore, not the subject of immunity." *Essays in Anglo-Saxon Law*, p. 61. See also Digby, *Law of Real Property*, p. 22. *The right to conscript the militia for home defense is as old as English law itself.* The militia thus drawn from the shires was the only military force that Alfred the Great could "call forth" against the Danes; it was the only military force that Harold could "call forth" to oppose the Norwegians in the great fight at Stamfordbridge; it was the only military force that Harold could "call forth" to oppose the Normans. Harold lost the battle of Hastings because the "main forces [militia] of Northumberland and northwestern Mercia came not to King Harold's muster." Freeman, *Norm. Conq.*, iii, p. 282. The county military system, known as the militia, survived the Norman Conquest unimpaired.

Stubbs, *Select Charters*, pp. 153–4. By the great statute of I Edw. III, c. 5, *purely declaratory*, it was provided that the militia could only be used at home for national defense, "*as has been used in times past for the defense of the realm.*" Down to 1786, the year before the meeting of the Federal Convention, it was not legally possible to take the English militia over the border into Scotland. In 1786 that was made possible by the Act of 26 Geo. III, c. 107, Sec. 95, concerning the militia, in which it was provided that "*neither the whole nor any part shall be ordered out of Great Britain.*" In the words of the Enc. Brit. (9 ed.): "The Militia of the United Kingdom consists of a number of officers and men maintained for the purpose of augmenting the military strength of the country in case of imminent national danger or great emergency. In such a contingency the whole or any part of the Militia is liable, by proclamation of the sovereign, TO BE EMBODIED, *that is to say, placed in active service within the confines of the United Kingdom.*" Mr. Dicey, one of the most eminent, certainly the most business-like and practical commentator on the modern English constitution, says *in his edition of 1908*: "EMBODIMENT *indeed converts the militia for the time being into a regular army*, THOUGH AN ARMY WHICH CAN NOT BE REQUIRED TO SERVE ABROAD."

Thus the fact is put beyond all question that down to 1908 the English Constitution forbade, *as it had for a thousand years*, the transportation of the militia abroad even after it was "*embodied*," that is, converted "*for the time being into a regular army.*" Dicey, *The Law of the Constitution*, pp. 287–8. AND SO, AFTER THE PRESENT WAR BEGAN, THE ENGLISH CONSTITUTION HAD TO BE ALTERED BY PARLIAMENT BEFORE ANY PART OF THE MILITIA COULD BE SENT ACROSS THE CHANNEL TO FRANCE—SOMETHING THAT HAD NEVER HAPPENED BEFORE IN ENGLISH HISTORY.

ORIGIN AND GROWTH OF ENGLISH MILITARY FORCES FOR SERVICE ABROAD.

England never had a military force that could be sent abroad until William the Conqueror brought such a force with him in the feudal host of professional soldiers who accompanied him. It was the duty of that host, *which simply supplemented the ancient constitutional force known as the militia*, "to attend the king in war, *within and without the realm*, mounted and armed, *during the regular term of service*." But as that regular term of service only lasted for forty days, it led to the device known as scutage or shield-money, which produced a fund with which the crown could employ mercenary and professional soldiers—*volunteers*—who could be sent abroad and kept there by contract. Out of that *purely voluntary system* of paid military service was evolved the regular or standing army of England as it existed at the date of our severance from the mother country; and upon the same general basis rested the standing and professional naval force of England at that time.

THE REGULAR ARMY AND NAVY SYSTEMS OF ENGLAND, PURELY VOLUNTARY, REPRODUCED BY THE FEDERAL CONVENTION OF 1787.

When the question of creating a military system arose in the Federal Convention of 1787, there seems to have been no real controversy as to the basis upon which our regular army—volunteer army—and navy—volunteer navy—should be organized. As the regular army and navy of England then rested strictly on the volunteer system we simply reproduced that system in those provisions of the Constitution which, for convenience, will be called GROUP A, ESTABLISHING A REGULAR ARMY AND NAVY. The Convention of 1787, after giving to Congress the power "to declare war," provided, Section 8, Article I,

that "The Congress shall have power . . . to raise and support armies, but no appropriation of money to that use shall be for longer than two years [the English Mutiny Act of 1689]; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces." Those three provisions, grouped together as a connected whole, relate solely and exclusively to one subject matter—the creation, maintenance and government of the regular army and navy of the United States, which is now and has always been maintained "*by voluntary enlistment.*" This basic fact is perfectly well known even to professional soldiers who are not lawyers. General Upton, in speaking of the provisions in question, in his *Military Policy of the United States*, p. 79, says: "Here was laid the foundation of the *volunteer system*, which attained its fullest development during our long civil war. The 'levies,' known later as 'volunteers,' were authorized under *the plenary power of Congress to 'raise and support armies,'* and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' *were wholly distinct from the militia or State troops.*" For a century and a quarter Congress has been giving a practical construction to the constitutional clauses embraced in Group A, by *raising, supporting and governing* under them the regular army and navy of the United States as *volunteer systems, entirely separate and apart from the militia systems, National and State.*

BITTER OPPOSITION IN THE CONVENTION OF 1787 TO THE CREATION OF A NATIONAL MILITIA ENTIRELY INDEPENDENT OF THE STATES.

Each of the original thirteen States organized bodies of State militia after the English model. "Militia musters" became the rule in the States as in the mother country.

But when the Convention of 1787 met those who may be called the Nationalists, with Washington at their head, contending that the State military had proven to be "*inefficient under the Confederation*," demanded the creating of a *National Militia system*, entirely apart from the State systems, which should be under the exclusive control of the new Federal Government. See Madison Papers, p. 730 and p. clxxxii, Gilpin ed. The proposal to create a national militia was made by George Mason, who, on August 18, "introduced the subject regulating the militia. He thought such a power necessary to be given to the general government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The militia ought, therefore, to be the more effectually prepared for the public defense. Thirteen States will never concur in any one system, if the disciplining of the militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as select militia." In supporting Mason's proposition Pierce Butler "urged the necessity of submitting the whole militia to the general authority, which had the care of the general defense; and Charles Pinckney, in contending that "Congress should have power to regulate the militia," said: "For a part to be under the general and a part under the State governments would be an incurable evil. He saw no room for such distrust of the general government." John Langdon next arose and said: "He saw no more reason to be afraid of the general government than of the State governments. He was more apprehensive of the confusion of the different authorities on the subject, than of either." The last word in favor of the creation of a National Militia was then spoken by James Madison, who said he "thought the regulation of the militia naturally appertained to the authority charged with the public defense. It did not seem, in its nature, to be

divisible between two distinct authorities. If the States would trust the general government with the power over the public treasure, they would, from the same consideration of necessity, grant it the direction of the public force. Those who had a full view of the public situation would, from the sense of the danger, guard against it. The States would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other." In the course of the debate "General Pinckney mentioned a case, during the war, in which a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. *The States would never keep up a proper discipline of the militia.*" Madison Papers, pp. 1355–1363.

The opposition to the creation of a National Militia was led by Gerry, who "was against letting loose the myrmidons of the United States on a State without its own consent." In opposing the new creation he said he "thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the States have not." Dickinson, with equal vehemency, said: "We are come now to a most important matter—that of the sword. His opinion was that the States never would, nor ought to, give up all authority over the militia. He proposed to restrain the general power to one-fourth part at a time, which by rotation would discipline the whole militia." In a more conservative temper Ellsworth said he "was for going as far, in submitting the militia to the general government, as might be necessary. . . . The whole authority over the militia ought by no means to be taken away from the States, whose consequence would pine away

to nothing after such a sacrifice of power. He thought the general authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. *It must be vain to ask the States to give the militia out of their hands.*" Madison Papers, pp. 1350–1362.

Thus was the issue sharply defined in the Convention between two factions—the States rights faction contending, in the words of Ellsworth, that it was "vain to ask the States to give the militia out of their hands;" the Nationalists urging, in the words of Pierce Butler, "the necessity of submitting the whole militia to the general authority which had the care of the general defense." The deadlock which thus arose was broken on this, as on many other occasions, by a compromise arranged by a grand committee of the States. (Elliot, V 445.) The partial victory won by the States rights faction was embodied in the concession that the States should continue to retain their militia systems, *subject to a certain degree of Federal control*. That concession was thus expressed in what will be called Group B: "The Congress shall have power . . . to provide for organizing, arranging, and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

By that concession thus made to the States rights party in the Convention of 1787, under which the continued existence of the State militia was guaranteed, subject to a certain amount of Federal control—the Nationalists purchased the right to have a National militia, *to be created by Congress*, entirely free from State control. That concession was thus expressed in what will be called Group C: "The Congress shall have power . . . to provide

for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions."

The first time Congress ever exercised that power was when it "called forth" the National Militia under the Conscription Act of March 3, 1863, for the expressly declared purpose of suppressing an insurrection.

The second time Congress exercised that power was when it "called forth" the National Militia under the Conscription Act of May 18, 1917, a sustantial reproduction of the first, *so far as conscription is concerned.* As there is no preamble to the last act the National Militia (*euphoniously styled a National Army in order to obscure its real character*), so called forth may be used "to execute the laws of the Union, suppress insurrections and repel invasions," but for no other purposes.

In limiting the use of the National Militia to the three purposes just stated the Convention had of course uppermost in its mind *the exemption of the English militia from service abroad*, which had been a vital part of the English constitution for a thousand years prior to our severance from the mother country. Every member of the Convention knew that the English militia could not be taken across the Channel, that it could only be used AT HOME "*to repel invasions.*" Therefore that ancient formula was transplanted into the Constitution of the United States in the belief, no doubt, that every school boy in the land would understand its meaning and its history.

THE FIRST RECOGNITION BY THIS COURT OF TWO DISTINCT SYSTEMS OF MILITIA, ONE STATE, ONE NATIONAL.

When this subject came for the first time before this Court in Houston *v.* Moore, 5 Wheat. 7, the two distinct systems of militia—the one created and maintained by the States, the other created and maintained by the Federal Government—were recognized and defined in terms so clear

and distinct as to preclude all doubt upon the subject. Mr. Hopkins for the plaintiff in error said in his brief: "The power to govern the militia thus called forth, and employed in the service of the United States, is exclusively in the National Government. *A National Militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government,*" citing Livingston *v.* Van Ingen, 9 Johns. Rep. 507, 565, 575. In accepting that view, and in drawing the line between the new national militia and the pre-existing State militia, the Court said: "But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the [State] Militia have been called forth and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. *Over the national militia, the State governments never had, nor could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none can exist.* . . . It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, *the other under the authority of the United States.*"

In analyzing this case it is all-important to remember that the question directly involved was *the construction of the Act of February 28, 1795.* As stated by the Court itself: "The act of 2d of May, 1792, which is reenacted almost *verbatim* by that of the 28th of February, 1795, authorizes the President of the United States, in case of

invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth SUCH NUMBER OF THE MILITIA OF THE STATES [there were no attempts in those early days to *create a national militia as such*] most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officers of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops."

THE FIRST RECOGNITION BY THIS COURT OF EXEMPTION FROM SERVICE ABROAD.

The case of Houston *v.* Moore was followed in due time by that of Martin *v.* Mott, 12 Wheat. 19 (1827), in which a new question, involving the construction of the Act of February 28, 1795, was presented here. That new question was this: Was an exclusive authority vested in the President to decide whether the exigencies had actually arisen, which were contemplated in the Constitution, and in said Act of 1795, authorizing him to call forth the State militia to execute the laws of the Union, suppress insurrections and repel invasions?" In reaching the conclusion that the exclusive authority so to decide was vested in the President, this Court settled a graver question. *It decided that State militia in the service of the United States, as well as national militia, are exempt from service abroad.* In the words of the Court: "The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action *before the invader himself has reached the soil.* . . . A free people are naturally jealous of the exercise of mili-

tary power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. *It is, in its terms,* A LIMITED POWER, *confined to cases* OF ACTUAL INVASION, OR OF IMMINENT DANGER OF INVASION." And so, this Court gave in 1827 a lucid and comprehensive definition of the ancient English formula "*to repel invasions.*" Then it was settled once for all that the militia of the United States, no matter whether State or national, can only be called forth to "repel invasions;" and that "the best means to repel invasion is to provide the requsite force for action *before the invader himself has reached the soil.*" IN OTHER WORDS, AN INVASION CAN ONLY BE REPELLED BY MEN STANDING ON THE SOIL OF THEIR OWN COUNTRY.

THE MOTIVE THAT PROMPTED THE FIRST ATTEMPT TO DESTROY THE EXEMPTION FROM SERVICE ABROAD ESTABLISHED BY SEC. 8, ART. I, OF THE CONSTITUTION.

Eighty years after this Court had, in Martin v. Mott, 12 Wheat. 19, 27, solemnly affirmed the exemption of the militia, State and national, from service abroad, certain lawless people, who claimed that such exemption had become an inconvenience by reason of the territorial expansion, incident to the Spanish-American War, undertook to destroy it by Congressional legislation. With that end in view, the Act of January 21, 1903, was amended by the Act of March 27, 1908, in such a way as to provide that "*the militia so called shall continue to serve during the term so specified, either within* OR WITHOUT THE TERRITORY OF THE UNITED STATES."

By that stupid device such evil-minded persons attempted to make Congress confer upon the President the power to rob the militia of its constitutional exemption from service abroad, in defiance of the elementary principle that the legislative department of the government can-

not confer upon the Executive a power it is expressly forbidden to exercise itself. When such device was submitted by President Taft to Attorney General Wickersham, a learned lawyer, with a thorough knowledge of English and American constitutional law, he trampled upon it in an elaborate official opinion delivered under his oath of office and dated February 17, 1912, in which, among other things, he said:

> "The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the general government, except to suppress insurrection, repel invasions, or to execute the laws of the Union. . . . This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom. Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body. . . . If authority is needed for the conclusion here reached, the following may suffice: In Ordronaux, Constitutional Legislation, page 501, it is said:
>
> "The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and, third, to repel invasions.
>
> "These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered ONLY UPON THE SOIL OF THE UNITED STATES OR OF ITS TERRITORIES. . . . IN THE HISTORY OF THIS PROVISION OF THE CONSTITUTION THERE IS NOTHING INDICATING THAT IT WAS EVEN CONTEMPLATED THAT SUCH TROOPS SHOULD BE EMPLOYED FOR PURPOSES OF OFFENSIVE WARFARE OUTSIDE THE LIMITS OF THE UNITED STATES. And it is but just to infer that the enumera-

tion of the specific occasions on which alone the militia can be called into the service of the general government was intended as a distinct limitation upon their employment." . . .

And in Von Holtz, Constitutional Law, page 170, it is said, "the militia cannot be taken out of the country." . . .

It is true that the Act of January 21, 1903, as amended by the Act of March 27, 1908 (35 Stat. 399), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia to be employed in the service of the United States he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. CONGRESS CAN NOT BY ITS OWN ENACTMENT ENLARGE THE POWER CONFERRED UPON IT BY THE CONSTITUTION; AND IF THIS PROVISION WERE CONSTRUED TO AUTHORIZE CONGRESS TO USE THE ORGANIZED MILITIA FOR ANY OTHER THAN THE THREE PURPOSES SPECIFIED, IT WOULD BE *UNCONSTITUTIONAL*. . . .

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, IT FORBIDS SUCH USE FOR ANY OTHER PURPOSE; and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

TO THE SECRETARY OF WAR.

After citing in that opinion the decisions of the Supreme Court of the United States (Houston *v.* Moore, 5 Wheat. 1, and Martin *v.* Mott, 12 Wheat. 19, 27) as irrevocably settling the exemption of the militia from service abroad, the Attorney General exposed, with striking emphasis, the emptiness of the stupid contention that, *although the Congress is expressly forbidden to authorize the sending of the militia, National or State, abroad, it may authorize the President to do so.* Speaking of the act before him which attempted to authorize the President to use the militia "*either within or without the territory of the United States,*" he said: "*If this provision were construed to authorize Congress to use the organized militia for any other than the three purposes specified, it would be unconstitutional.*" Thus, in advance, he put the stamp of nullity upon any clause or phrase in the Conscription Act of May 18, 1917, which may be so construed as to express such an unconstitutional purpose.

EXEMPTION IN QUESTION AGGRESSIVELY AFFIRMED BY PRESIDENT WILSON IN 1916.

After the foregoing opinion of Attorney General Wickersham had become the law of the Department of Justice, and as such binding in this vital matter upon President Wilson, he affirmed it, with great emphasis, in four speeches delivered in January and February, 1916, when he was called upon to explain why he could do no more for the development of the State militia, now euphoniously called the National Guard.

In an address delivered at New York, January 27, 1916, he said: "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm *of our national defense* should be built up and encouraged to the utmost; *but, you know*, gentlemen, *that under the Constitu-*

tion of the United States the National Guard is under the direction of more than twoscore States; that it is not permitted to the National Government directly to have a voice in its development and organization; *and that only upon occasion of* ACTUAL INVASION *has the President of the United States the right to ask those men to leave their respective States.*" In an address delivered at Cleveland, Ohio, January 29, 1916, he said: "The President of the United States has not the right to call on these men [the National Guard] except in the case *of actual invasion*, and, therefore, no matter how skillful they are, no matter how ready they are, they are not the instruments for immediate National use." In an address delivered at Milwaukee, January 31, 1916, he said: "The National Guard, fine as it is, *is not subject to the orders of the President of the United States.* It is subject to the orders of the governors of the several States, *and the Constitution itself* says that the President has no right to withdraw them from their States even, *except in the case of actual invasion of the soil of the United States.*" In an address delivered at Topeka, Kansas, February 2, 1916, he said: "*The Constitution of the United States* puts them [the National Guard] under the direct command and control of the governors of the States, not of the President of the United States, and the *national authority has no right to call upon them for any service outside their States unless the territory of the Nation* IS ACTUALLY INVADED."

Thus it appears (1) that in 1827 this Court in a unanimous judgment declared that the militia, State and National, can only be used for one of the three purposes clearly defined in Sec. 8, Art. I, of the Constitution; that to "repel invasions" means "to provide the requisite force for action, *before the invader himself has reached the soil;*" or, in the words of Ordronaux, "the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (2) that in 1912, when the expan-

sionists, after the Spanish-American War, attempted to destroy the Constitutional exemption by Congressional legislation, the entire subject was examined by Attorney General Wickersham who trampled upon the stupid device then invented, declaring that the militia, both State and National, is exempt from service abroad; "that the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (3) that President Taft, an eminent and experienced constitutional lawyer, at whose instance the Wickersham opinion was prepared, accepted its conclusions as final and unquestionable; (4) that in 1916 President Wilson, recognizing the Wickersham opinion as the law of the Department of Justice and as such binding upon him, solemnly reaffirmed its conclusions in four speeches, now in print, delivered in the months of January and February, 1916.

THE FATHERS SO CONSTRUCTED OUR UNIQUE FEDERAL CONSTITUTION AS TO MAKE US THE STRONGEST OF NATIONS, FOR THE PURPOSES OF NATIONAL DEFENSE, AND THE WEAKEST, FOR THE PURPOSES OF FOREIGN AGGRESSION.

This Court's judicial knowledge, as defined by itself, embraces the entire field occupied by our constitutional and political history, embracing also matters of geography, Keene *v.* McDonough, 8 Pet. 398; Bank of Augusta *v.* Earle, 13 Pet. 519; The Divina Pastora, 4 Wheat. 52; Brown *v.* Piper, 91 U. S. 37; Prize Cases, 2 Black, 635; Sparrow *v.* Strong, 3 Wall. 97; U. S. *v.* Jackson, 104 U. S. 41; Neely *v.* Henkel, 180 U. S. 109. This Court therefore knows judicially that the rock upon which our constitutional life is founded had carved upon it by the fathers themselves this fundamental maxim, "*Never entangle ourselves in the broils of Europe; never suffer Europe to intermeddle with cis-Atlantic affairs.*" In obedience to its own rules this Court must keep constantly before its eyes that fundamental maxim in solving the questions of

constitutional law involved in this case. Just as this Court knows judicially all the historical causes which led up to the Civil War (Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3, 523, 1 Abb. 169), it knows judicially all the historical causes that led up to the making of the existing Constitution of the United States. But so perfectly is the fundamental maxim just stated known of all men—laymen and lawyers, civilians and soldiers—that it will only be necessary to offer in support of it a lucid little book, entitled "*Our Military History, Its Facts and Fallacies*," published in 1916 by a distinguished and law-loving soldier, General Leonard Wood, who now has in his military custody Robert Cox. In his "Foreword" the author says: "Our policy is not one of aggression, but one which looks only to a secure defense. Consequently the arrangements for our military establishment should be limited to the needs of *a secure and certain national defense against foes which may be brought against us.*" After reviewing the histories of the War of the Revolution and the War of 1812, the author says that we have been compelled to fight all our wars WITH VOLUNTEERS, "*because the militia was not available for service outside of the United States.*" He then adds that we had so to conduct the Mexican War "*where the militia could not be used because of the constitutional limitation upon its employment outside of the United States*" (pp. 145-146).

THE SUDDENLY CONSTRUCTED AND PREPOSTEROUS CONTENTION THAT, IN OPEN DEFIANCE OF THE LONG-SETTLED CONSTITUTIONAL EXEMPTION OF THE MILITIA, STATE AND NATIONAL, FROM SERVICE ABROAD, IT MAY BE SENT TO THE BATTLEFIELDS OF EUROPE BY A MERE MILITARY ORDER OF THE PRESIDENT OF THE UNITED STATES.

Our entire fabric of civil liberty rests upon the principle that this is a government of law "as contradistinguished to a government of functionaries." (Lieber, *Civil Liberty and Self-Government*, p. 91.) A famous commentator on

the English Constitution has said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." (Dicey, *The Law of the Constitution*, p. 183.) In United States v. Lee, 106 U. S. 196, this Court, speaking in thunder tones through Mr. Justice Miller, said: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creations of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, *but also upon rights in controversy between them and the Government*, and the docket of this Court is crowded with controversies of the latter class."

Inflamed by the passions of war, and apparently unmindful of the Constitution as expounded by this Court and by the Department of Justice, certain persons, WHO DO NOT DARE TO PROPOSE AN AMENDMENT OF THE CONSTITUTION, are now maintaining that the National Militia, *lawfully con-*

scripted and assembled in camps for the highly patriotic purpose of "repelling invasions," may, by a mere Executive order, be transported over thousands of miles of sea to the battlefields of Europe in open defiance of the constitutional exemption from military service abroad. The President himself has stated in a solemn address that "*American armies were never before sent across the seas;*" this Court knows judicially that neither the American people nor the American Congress have uttered one word authorizing the sending of American armies "across the seas." How to give even color or semblance of legality to such a revolutionary proposal has taxed to the utmost the ingenuity of the inventors of the startling proposal in question. Without having seen the Government's brief in these cases, we understand that it will be contended here that the National Militia now in camps was not called forth by Congress under that part of Sec. 8, Art. I, which authorizes that body "To provide for calling forth the [National] Militia *to execute the laws of the Union, suppress insurrections and repel invasions,*" but under that part of Sec. 8, Art. I, which authorizes Congress "To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years" [the English Mutiny Act, by which the standing army of Great Britain, *composed of volunteers,* can be dissolved annually by Parliament. The most notable sponsor for the new theory has stated it in this form: "While the President is Commander in Chief, in the Congress resides the authority 'to raise and support armies' and, 'to provide and maintain a navy,' and, 'to make rules for the government and regulation of the land and naval forces,' and as a safeguard against military domination, the power to raise and support armies is qualified by the provision that 'no appropriation of money to that use shall be for a longer term than two years.' *Otherwise this power is unlimited.*" We will undertake to

expose the utter emptiness of that incongruous jumble of ideas, without any historical or logical basis whatever, in the following order:

1. Under a fundamental canon of construction, recognized from the beginning by this Court, every part of the Constitution which is taken directly from the English is interpreted in the light of its history in the mother country. When in the trial of Burr, for treason, it became necessary for Chief Justice Marshall to define the meaning of the term "levying war" as used in Art. III, Sec. 3, he said: "But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. *It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it.*" This Court has reiterated that obvious and necessary rule in Rhode Island *v.* Mass., 12 Pet. 657; Income Tax Cases, 157 U. S. 429; U. S. *v.* Wong Kim Ark, 169 U. S. 279; and very recently in Gompers *v.* United States, 233 U. S. 604, in which this Court, speaking through Mr. Justice Holmes, has well said: "But the provisions of the Constitution are not mathematical formulas having their essence in their form; *they are organic, living institutions transplanted from English soil.*" And so when the Convention of 1787 determined to vest in Congress the power to create a regular or standing army *on the volunteer system*, in exact imitation of the English regular or standing army, resting then as now on the *volunteer system*, it vested in it the power "To raise and support [volunteer] armies, *but no appropriation of money to that use shall be for a longer term than two years.*" If anything is needed to make what has been said conclusive it is supplied by that part of this provision in italics which is simply a reproduction of the

English Mutiny Act of 1689 by which Parliament can dissolve the regular or standing army of England, *composed of volunteers*, whenever it sees fit. Knowing that it is only authorized to "raise and support [volunteer] armies" under the clause in question, Congress has for *an hundred and twenty-five years "raised and supported" the regular or* VOLUNTEER *army of the United States* by legislation passed under that provision. So notorious is that fact, that even professional soldiers, not jurists, are perfectly familiar with it. In referring to the constitutional provision in question, in his *Military Policy of the United States*, p. 79, Upton says: "Here were laid the foundations of the *volunteer system*, which attained its fullest development during our long Civil War. The 'levies,' known later as '*volunteers*,' were authorized under *the plenary power of Congress to 'raise and support armies*,' and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' *were wholly distinct from the militia*." This Court will see at a glance that the provision in question, *with the English Mutiny Act in its stomach*, under which Congress has always "raised and supported" the *volunteer* armies of the United States, has no more connection with the enactment of the Conscription Act of May 18, 1917, than a clause taken from the Talmud or Pentateuch. The grotesque theory, *suddenly resurrected as a war measure to defeat the constitutional exemption of the National Militia from service abroad*, does not rise to the dignity of an argument.

2. There is no basis of fact whatever for the imputation that when Congress enacted the Conscription Act of May 18, 1917, it attempted to draw its power to do so, not from the clause authorizing it "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," upon which was based, *in express terms*, the Conscription Act of March 3, 1863, but

from the clause authorizing it "To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years." To prevent any possible misconception on that branch of the subject the two acts—*the only conscription acts ever passed by Congress*—have been printed in parallel columns in Appendix B hereto. The Court will see at a glance that the Conscription Act of May 18, 1917, is not only a substantial but a close reproduction of the Conscription Act of March 3, 1863, *so far as the conscription clauses are concerned*. Here the fact must be kept steadily in view that the Conscription Act of May 18, 1917, under which the National Militia is now being drafted, is not an original measure; *as appears upon its face it is simply an extension or supplement to carry into effect the National Defense Act of June 3, 1916*. By Sec. 57 of that Act the National Militia is thus defined:

> "COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, AND SAID MILITIA SHALL BE DIVIDED INTO THREE CLASSES, THE NATIONAL GUARD, THE NAVAL MILITIA, AND THE UNORGANIZED MILITIA."

The primary and avowed purpose of the Conscription Act of May 18, 1917, is to organize "*the Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . *between the ages of twenty-one and thirty years*." Thus the fact is fixed with mathematical certainty that the Act of May 18, 1917, was passed in order to call out the National Militia, as such, "to execute the laws of the Union, suppress insurrections and repel invasions," first,

because it is really little more than a copy of the first conscription act of March 3, 1863; second, because its avowed purpose is to organize the "*Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . *between the ages of twenty-one and thirty years.*" Even a struggle of despair cannot justify the attempt to deny that the Conscription Act of May 18, 1917, was passed under that part of Sec. 8, Art. I, which authorizes Congress to call out the National Militia to "execute the laws of the Union, suppress insurrections and repel invasions."

3. In conclusion, let this question be asked and answered: Did it ever enter into the mind of an American legislator to propose in the Congress of the United States *a conscription law* under that clause of the Constitution which authorizes that body "To raise and support armies," *so that those so conscripted could be incorporated in the ranks of the regular or volunteer army and taken with it beyond the territorial limits of the United States?* Yes, such a measure was offered in the House of Representatives during the War of 1812; and on December 9, 1814, Daniel Webster crushed it in an oration that will live forever. The great orator in describing the character of the act said: "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, *for the general purposes of the war*, under color of a military service. . . . The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution — 'to repel invasion, suppress insurrection, or execute the laws.' . . . The only section which would have confined the services of the militia proposed to be raised, within the United States, has been stricken out, and if the President should not march them into the Provinces

of England at the North, or of Spain at the South, it will not be because he is prohibited by any provision in this Act . . . *What is this, Sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require?* . . . In the present want of men and money, the Secretary of War has proposed to Congress a Military Conscription. For the conquest of Canada the people will not enlist, and if they would the treasury is exhausted and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming the reluctance to the Service, and of subduing the difficulties which arise from the deficiencies of the exchequer. THE ADMINISTRATION ASSERTS THE RIGHT TO FILL THE RANKS OF THE REGULAR ARMY BY COMPULSION. . . . Congress having, by the Constitution, *a power to raise armies*, the Secretary contends that no restraint is to be imposed on the exercise of this power, except such as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers by any means it chooses, unless such means are particularly prohibited."

Here we have, in all its grandeur, the pending contention that under the clause that authorizes Congress "*To raise and support armies*" — that is, regular armies based on the volunteer system — a conscription act may be passed to "*fill the ranks of the Regular Army by compulsion*," such conscripts as a part of the Regular Army being subject of course to service abroad.

In trampling the life out of that deadly assault upon the Constitution he loved so well Webster said: "On the issue of this discussion, I believe the fate of this Government may rest. Its duration is incompatible, in my opinion, with the existence of the measures in contemplation. A crisis has at last arrived, to which the course of things has long tended, and which may be decisive upon

the happiness of present and future generations. If there be anything important in the concerns of men, the considerations which fill the present hour are important. I am anxious above all things to stand acquitted before God, and my conscience, and in the public judgments, of all participation in the counsels which have brought us to our present condition and which now threaten the dissolution of the Government. When the present generation of men shall be swept away and that this Government ever existed shall be a matter of history only, I desire that it may then be known that you have not proceeded in your course unadmonished and unforewarned. Let it then be known that there were those who would have stopped you in the career of your measures, and held you back, as by the skirts of your garments, from the precipice, over which you are plunging, and drawing after the Government of your country. . . .

"*It is time for Congress to examine and decide for itself. It has taken things on trust long enough.* It has followed Executive recommendation till there remains no hope of finding safety in that path. . . .

"Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, *at home or abroad, for defense or for invasion*, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to Government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.

"Is this, Sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of

this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasures and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it?

"If the Secretary of War has proved the right of Congress *to enact a law enforcing a draft of men out of the militia into the Regular Army*, he will at any time be able to prove quite as clearly that Congress has power ro create a Dictator. The arguments which have helped him in one case will equally help him in the other."

Thus it appears that the chimerical theory—based upon the assumption that Congress, under the power to "raise and support [volunteer] armies," may conscript into the Regular Army from the militia soldiers, *who may thus be defrauded of their constitutional exemption from service abroad*—is an ancient device constructed during the War of 1812, and trampled to death by Daniel Webster on December 9, 1814. Those who are now striving to lift this dead heresy out of the forgotten grave in which it has slept from that day to this should be careful to explain its paternity.

THE GRAVITY OF THE QUESTION PRESENTED BY THE CASE OF ROBERT COX.

It is impossible to exaggerate the gravity of the question presented by the case of Robert Cox, a native born American youth, who, while affirming the validity of the act under which he has been conscripted, appeals to this Court to secure to him the exemption from military service beyond the territorial limits of the United States solemnly guaranteed by that clause of the Constitution under which the act in question was passed. His case thus involves, first, the oldest and most fundamental right known to English and American constitutional law; second, it involves the lives of hundreds of thousands, perhaps millions, of American youths who, if this sacred right is ignored, may be driven to the battlefields of Europe by a mere Executive order made in open defiance of the Constitution of the United States. Certainly this Court will not pass upon such a momentous question, involving the lives and liberties of hundreds of thousands of American citizens, without exhaustive argument, oral and written, at its bar. The case of Dred Scott involved only the making of slaves freemen; the case of Robert Cox involves, if the foregoing views of Webster are sound, the making of freemen slaves.

All of which is most respectfully submitted.

HANNIS TAYLOR,
JOSEPH E. BLACK,
As Amici Curiæ and as
Counsel for Robert Cox.

APPENDIX B.

THE ONLY TWO CONSCRIPTION LAWS EVER ENACTED BY THE CONGRESS OF THE UNITED STATES.

The *second*, the Act of May 18, 1917, is a substantial reproduction of the *first*, the Act of March 3, 1863, *so far as conscription is concerned.*

The Act of March 3, 1863

An Act for enrolling and calling out the national Forces, and for other Purposes.

Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government TO SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

SEC. 2. *And be it further enacted*, That the following persons be, and they are hereby, excepted and exempt from the provisions of this act, and shall not be liable to military duty under the same, to wit: Such as are rejected as physically or mentally unfit for the service; also, First the Vice-President of the United

The Act of May 18, 1917

An Act to authorize the President to increase temporarily the Military Establishment of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness req isite for permanent appointment.

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with

States, the judges of the various courts of the United States, the heads of the various executive departments of the government, and the governors of the several States. Second, the only son liable to military duty of a widow dependent upon his labor for support. Third, the only son of aged or infirm parent or parents dependent upon his labor for support. Fourth, where there are two or more sons of aged or infirm parents subject to draft, the father, or, if he be dead, the mother, may elect which son shall be exempt. Fifth, the only brother of children not twelve years old, having neither father nor mother dependent upon his labor for support. Sixth, the father of motherless children under twelve years of age dependent upon his labor for support. Seventh, where there are a father and sons in the same family and household, and two of them are in the military service of the United States as non-commissioned officers, musicians, or privates, the residue of such family and household, not exceeding two, shall be exempt. And no persons but such as are herein excepted shall be exempt: *Provided, however*, That no person who has been convicted of any felony shall be enrolled or permitted to serve in said forces.

SEC. 3. *And be it further enacted*, That the national forces of the United States not now in the military service, enrolled under this act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of twenty and thirty-five years, and all unmarried persons subject to do military duty above the age of thirty-five and under the age of forty-five; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the service of the United States until those of the first class shall have been called.

SEC. 4. *And be it further enacted*, That, for greater convenience in enrolling, calling out, and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each territory of the United States shall constitute one or more, as the the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: *Provided further*, That the President is authorized to increase or decrease the number of organ-

President shall direct, and each congressional district of the respective states, as fixed by a law of the state next preceding the enrolment, shall constitute one: *Provided*, That in states which have not by their laws been divided into two or more congressional districts, the President of the United States shall divide the same into so many enrolment districts as he may deem fit and convenient.

SEC. 5. *And be it further enacted*, That for each of said districts there shall be appointed by the President a provost-marshal, with the rank, pay, and emoluments of a captain of cavalry, or an officer of said rank shall be detailed by the President, who shall be under the direction and subject to the orders of a provost-marshal-general, appointed or detailed by the President of the United States, whose office shall be at the seat of government, forming a separate bureau of the War Department, and whose rank, pay, and emoluments shall be those of a colonel of cavalry.

SEC. 6. *And be it further enacted*, That it shall be the duty of the provost-marshal-general, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates; to furnish them with the names and residences of all deserters from the army, or any of the land forces in the service of the United States, including the militia, when reported to him by the commanding officers; to communicate to them all orders of the President in reference to calling out the national forces; to furnish proper blanks and instructions for enrolling and drafting; to file and preserve copies of all enrolment lists; to require stated reports of all proceedings on the part of his subordinates; to audit all accounts connected with the service under his direction; and to perform such other duties as the President may prescribe in carrying out the provisions of this act.

SEC. 7. *And be it further enacted*, That it shall be the duty of the provost-marshals to arrest all deserters, whether regulars, volunteers, militiamen, or persons called into the service under this or any other act of Congress, wherever they may be found, and to send them to the nearest military commander or military post; to detect, seize, and confine

izations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: *Provided further*, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: *Provided further*, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: *Provided further*, That the President in his discretion may organize for each division one armored motor car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: *And provided further*, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: *Provided further*, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section in addition to and for each of the above forces such recruit training units as he may

spies of the enemy, who shall without unreasonable delay be delivered to the custody of the general commanding the department in which they may be arrested, to be tried as soon as the exigencies of the service permit; to obey all lawful orders and regulations of the provost-marshal-general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.

SEC. 8. *And be it further enacted*, That in each of said districts, there shall be a board of enrolment, to be composed of the provost-marshal, as president, and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practising physician and surgeon.

SEC. 9. *And be it further enacted*, That it shall be the duty of the said board to divide the district into sub-districts of convenient size, if they shall deem it necessary, not exceeding two, without the direction of the Secretary of War, and to appoint, on or before the tenth day of March next, and in each alternate year thereafter, an enrolling officer for each sub-district, and to furnish him with proper blanks and instructions; and he shall immediately proceed to enroll all persons subject to military duty, noting their respective places of residence, ages on the first day of July following, and their occupation, and shall, on or before the first day of April, report the same to the board of enrolment, to be consolidated into one list, a copy of which shall be transmitted to the provost-marshal-general on or before the first day of May succeeding the enrolment: *Provided, nevertheless*, That if from any cause the duties prescribed by this section cannot be performed within the time specified, then the same shall be performed as soon thereafter as practicable.

SEC. 10. *And be it further enacted*, That the enrolment of each class shall be made separately, and shall only embrace those whose ages shall be on the first day of July thereafter between twenty and forty-five years.

SEC. 11. *And be it further enacted*, That all persons thus enrolled shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United deem necessary for the maintenance of such forces at the maximum strength.

Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided.

Seventh. The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this Act: *Provided*, That the organization of said force shall be the same as that of the corresponding organization of the Regular Army: *And provided further*, That there shall be no enlistments in said force of men under twenty-five years of age at time of enlisting: *And provided further*, That no such volunteer force shall be accepted in any unit smaller than a division.

SEC. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, *or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft;* and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall

States, and to continue in service during the present rebellion, not, however, exceeding the term of three years; and when called into service shall be placed on the same footing, in all respects, as volunteers for three years, or during the war, including advance pay and bounty as now provided by law.

SEC. 12. *And be it further enacted*, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district the number of men to be furnished by said district; and thereupon the enrolling board shall, under the direction of the President, make a draft of the required number, and fifty per cent. in addition, and shall make an exact and complete roll of the names of the persons so drawn, and of the order in which they were drawn, so that the first drawn may stand first upon the said roll, and the second may stand second, and so on; and the persons so drawn shall be notified of the same within ten days thereafter, by a written or printed notice, to be served personally or by leaving a copy at the last place of residence, requiring them to appear at a designated rendezvous to report for duty. In assigning to the districts the number of men to be furnished therefrom, the President shall take into consideration the number of volunteers and militia furnished by and from the several states in which said districts are situated, and the period of their service since the commencement of the present rebellion, and shall so make said assignment as to equalize the numbers among the districts of the several states, considering and allowing for the numbers already furnished as aforesaid and the time of their service.

SEC. 13. *And be it further enacted*, That any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procuration of such substitute; which sum shall be fixed at a uniform rate by a general order made at the time of ordering a take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: *Provided*, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

SEC. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the

draft for any state or territory; and thereupon such person so furnishing the substitute, or paying the money shall be discharged from further liability under that draft. And any person failing to report after due service of notice, as herein prescribed, without furnishing a substitute, or paying the required sum therefor, shall be deemed a deserter, and shall be arrested by the provost-marshal and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrolment shall relieve him from the draft.

SEC. 14. *And be it further enacted*, That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon of the board, who shall truly report to the board the physical condition of each one; and all persons drafted and claiming exemption from military duty on account of disability, or any other cause, shall present their claims to be exempted to the board, whose decision shall be final.

SEC. 15. *And be it further enacted*, That any surgeon charged with the duty of such inspection who shall receive from any person whomsoever any money or other valuable thing, or agree, directly or indirectly, to receive the same to his own or another's use for making an imperfect inspection or a false or incorrect report, or who shall wilfully neglect to make a faithful inspection and true report, shall be tried by a court-martial, and, on conviction thereof, be punished by fine not exceeding five hundred dollars nor less than two hundred, and be imprisoned at the discretion of the court, and be cashiered, and dismissed from the service.

SEC. 16. *And be it further enacted*, That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; and all drafted persons reporting at the place of rendezvous shall be allowed travelling pay from their places of residence; and all persons discharged at the place of rendezvous shall be allowed travelling pay to their places of residence; and all expenses connected with the enrolment and draft, including subsistence while at the rendezvous, United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

SEC. 4. That the Vice-President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots, mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of

shall be paid from the appropriation for enrolling and drafting, under such regulations as the President of the United States shall prescribe; and all expenses connected with the arrest and return of deserters to their regiments, or such other duties as the provost-marshal shall be called upon to perform, shall be paid from the appropriation for arresting deserters, under such *such* regulations as the President of the United States shall prescribe: *Provided*, The provost-marshals shall in no case receive commutation for transportation or for fuel and quarters, but only for forage, when not furnished by the government, together with actual expenses of postage, stationery, and clerk hire authorized by the provost-marshal-general.

SEC. 17. *And be it further enacted*, That any person enrolled and drafted according to the provisions of this act who shall furnish an acceptable substitute, shall thereupon receive from the board of enrolment a certificate of discharge from such draft, which shall exempt him from military duty during the time for which he was drafted; and such substitute shall be entitled to the same pay and allowances provided by law as if he had been originally drafted into the service of the United States.

SEC. 18. *And be it further enacted*, That such of the volunteers and militia now in the service of the United States as may reenlist to serve one year, unless sooner discharged, after the expiration of their present term of service, shall be entitled to a bounty of fifty dollars, one-half of which to be paid upon such reënlistment, and the balance at the expiration of the term of reënlistment; and such as may reënlist to serve for two years, unless sooner discharged, after the expiration of their present term of enlistment, shall receive, upon such reenlistment, twenty-five dollars of the one hundred dollars bounty for enlis ment provided by the fifth section of the act approved twenty-second of July, eighteen hundred and six'y-one, entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property."

SEC. 19. *And be it further enacted*, That whenever a regiment of volunteers of the same arm, from the same State, is re-

the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: *Provided*, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiciton under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the Presi-

duced to one-half the maximum number prescribed by law, the President may direct the consolidation of the companies of such regiment: *Provided*, That no company so formed shall exceed the maximum number prescribed by law. When such consolidation is made, the regimental officers shall be reduced in proportion to the reduction in the number of companies.

SEC. 20. *And be it further enacted*, That whenever a regiment is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number.

SEC. 21. *And be it further enacted*, That so much of the fifth section of the act approved seventeenth July, eighteen hundred and sixty-two, entitled, "An act to amend an act calling forth the militia to execute the laws of the Union," and so forth, as requires the approval of the President to carry into execution the sentence of a court-martial be, and the same is hereby, repealed, as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offences may be carried into execution upon the approval of the commanding general in the field.

SEC. 22. *And be it further enacted*, That courts-martial shall have power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks or to serve three years or during the war.

SEC. 23. *And be it further enacted*, That the clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, furnished as aforesaid, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized

dent to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, of the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision.

Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of

to receive the same; and the possession of any such clothes, arms, military outfits, or accoutrements, by any person not a soldier or officer of the United States, shall be *primâ facie* evidence of such a sale, barter, exchange, pledge, loan, or gift, as aforesaid.

SEC. 24. *And be it further enacted*, That every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such; or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and be shall be imprisoned not exceeding two years nor less than six months.

SEC. 25. *And be it further enacted*, That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost-marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments.

SEC. 26. *And be it further enacted*, That immediately after the passage of this act, the President shall issue his proclamation stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

SEC. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

mation declaring that all soldiers now absent from their regiments without leave may return within a time specified to such place or places as he may indicate in his proclamation, and be restored to their respective regiments without punishment, except the forfeiture of their pay and allowances during their absence; and all deserters who shall not return within the time so specified by the President shall, upon being arrested, be punished as the law provides.

SEC. 27. *And be it further enacted*, That depositions of witnesses residing beyond the limits of the state, territory, or district in which military courts shall be ordered to sit, may be taken in cases not capital by either party, and read in evidence; provided the same shall be taken upon reasonable notice to the opposite party, and duly authenticated.

SEC. 28. *And be it further enacted*, That the judge advocate shall have power to appoint a reporter, whose duty it shall be to record the proceedings of and testimony taken before military courts instead of the judge advocate; and such reporter may take down such proceedings and testimony in the first instance in shorthand. The reporter shall be sworn or affirmed faithfully to perform his duty before entering upon it.

SEC. 29. *And be it further enacted*, That the court shall, for reasonable cause, grant a continuance to either party for such time and as often as shall appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

SEC. 30. *And be it further enacted*, That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, *further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

SEC. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who in any manner, shall fail or neglect fully

territory, or district in which they may have been committed.

SEC. 31. *And be it further enacted*, That any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties prescribed by law or a court-martial, forfeit all pay or allowances during such absence.

SEC. 32. *And be it further enacted*, That the commanders of regiments and of batteries in the field, are hereby authorized and empowered to grant furloughs for a period not exceeding thirty days at any one time to five per centum of the non-commissioned officers and privates, for good conduct in the line of duty, and subject to the approval of the commander of the forces of which such non-commissioned officers and privates form a part.

SEC. 33. *And be it further enacted*, That the President of the United States is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft, in the manner provided for in this act.

SEC. 34. *And be it further enacted*, That all persons drafted under the provisions of this act shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require.

SEC. 35. *And be it further enacted*, That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men.

SEC. 36. *And be it further enacted*, That general orders of the War Department, numbered one hundred and fifty-four and one hundred and sixty-two, in reference to enlistments from the volunteers into the regular service, be, and the same are hereby, rescinded; and hereafter no such enlistments shall be allowed.

SEC. 37. *And be it further enacted*, That the grades created in the cavalry forces to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

SEC. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this Act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

of the United States by section eleven of the act approved seventeenth July, eighteen hundred and sixty-two, and for which no rate of compensation has been provided, shall be paid as follows, to wit: Regimental commissary the same as regimental quartermaster; chief trumpeter the same as chief bugler, sad[d]ler-sergeant the same as regimental commissary-sergeant; company commissary-sergeant the same as company quartermaster's sergeant: *Provided*, That the grade of supernumerary second lieutenant, and two teamsters for each company, and one chief farrier and blacksmith for for each regiment, as allowed by said section of that act, be, and they are hereby, abolished; and each cavalry company may have two trumpeters, to be paid as buglers; and each regiment shall have one veterinary surgeon, with the rank of a regimental sergeant-major, whose compensation shall be seventy-five dollars per month.

SEC. 38. *And be it further enacted*, That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.

APPROVED, March 3, 1863.

SEC. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grade as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grade in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense Act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grade in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

SEC. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service, and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any com-

missioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

SEC. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service *in the Regular Army;* and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose base pay does not exceed $21 per month shall receive an increase of $15 per month; those whose base pay is $24, an increase of $12 per month; those whose base pay is $30, $36, or $40, an increase of $8 per month; and those whose base pay is $45 or more, an increase of $6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

SEC. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

SEC. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for mili-

tary purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

SEC. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both.

SEC. 14. That all laws and parts of laws in conflict with the provisions of this Act are hereby suspended during the period of this emergency.

APPROVED, May 18, 1917.

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917

No. 656

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR,

AND EIGHT OTHER CAUSES, NOS. 663, 664, 665, 666, 680, 631, 702 AND 738.

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Since many briefs are before the Court in these cases, there is no intention of repeating in this one any comprehensive general demonstration of the unconstitutionality of the Conscription Act. Its purpose is to present separately and distinctly a case against the Act from the point of view of

those who object to participation in this war on grounds of conscience.

Of course there are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man. In each class individual views vary as widely as individual powers of coherent statement. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. Norman M. Thomas clearly stated it in an article entitled "War's Heretics," which appeared in the August 11, 1917, issue of the *Survey*:

> "In short, conscientious objectors include Christians, Jews, agnostics and atheists; economic conservatists and radicals; philosophic anarchists and orthodox socialists.
>
> "It is not fair, therefore, to think of the conscientious objector simply as a man who with a somewhat dramatic gesture would save his own soul though liberty perish and his country be laid in ruins. I speak with personal knowledge when I say that such an attitude is rare. Rightly or wrongly, the conscientious objector believes that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."

Millions of Americans would find it impossible to believe, even if this Court should so hold, that our fundamental law secures no place in democracy for persons of such conviction. It lies deep in the moral foundations of every one who has been an American schoolboy that the cardinal excellence of our government is that it assures, to all men at all times, freedom—which, to mean anything, must mean freedom to believe as individual judgment and conscience may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such

freedom both indirectly, by recognizing the retention by the people of their unenumerated natural rights (Amendment IX), and directly, by forbidding Congress to make laws prohibiting the free exercise of religion (Amendment I).

The Conscription Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or their duty towards Man.

(a) *The Inadequacy of the Provision of the Conscription Act for the Exemption of so-called "Religious" Objectors.*

The Conscription Act provides for the *partial* exemption of a small fraction of the "religious" conscientious objectors:

> "Nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized or existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant."
>
> Act of May 18, 1917, Sect. 4.

In the eighteenth or early nineteenth centuries it might have been reasonable to hold negligible for practical purposes such religion as was not connected with "any well-recognized religious sect or organization at present organized and existing." Nearly every one's sacred beliefs had relation with a Deity, and nearly every one adhered to the forms and tenets of some well-recognized sect or organization.

But now for a long time this has not been so. Our period is often thought of as one in which organized religions tend to decay and disappear. Old organizations such as Roman Catholicism and evangelistic and Protestant bodies here and there, and new ones such as Mormonism and Christian Science, demonstrate a surviving power over conduct and conscience. But the time when the religious devotion of *all* men, or even of *most*, submitted as a matter of course to organized guidance has long since passed. Churches founded by the grandfathers of men who fought at Lexington no longer even open their doors on Sunday for congregations which would not come. To maintain nominal connection with an hereditary religious establishment is no longer important even to respectability.

That religion has tremendously overflowed, even if it has not yet quite obliterated, the boundaries of organized sects, would hardly be debatable even had it never been authoritatively declared. It was so declared by this Court as early as 1889, though Congress in 1917 seems unaware of it. Justice Field, in *Davis vs. Beason*, 133 U. S., 342, said:

> "It" (referring to *religion*) is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."

The inadequacy of the exemption clause in the Conscription Act is apparent. The Act effectually denies free exercise of religion even to devout persons who regard non-participa-

tion in the war as among the duties imposed by their relations with their Maker, *unless* they happen to be members of a particular sect which includes pacifism in its *cultus*. And even if they belong to such a sect, their right to free exercise of religion is at the discretion of the President.

(b) *Free Exercise of Religion in its Broader Aspect.*

Many persons who base conscientious objection to military service squarely upon the duties imposed by their relations to their Maker are now in jail or the cantonments. Such persons, however, are only part of those whose fundamental beliefs are outraged by the Conscription Act. The Constitution protects these others, too, even though Justice Field's definition is not, literally construed, broad enough to cover them.

Justice Field's definition was accurate for practical purposes only so long as the custom was still general of weaving matters of right and wrong into relation with the will and purposes of a putative Maker. God was commonly supposed, for example, to have views upon such matters as dancing and card-playing. Though intelligent men may have laughed at such crudities, they were neither shocked nor surprised by them. The personal imminence of a Maker was taken for granted.

The twentieth century, however, must and does recognize that religion can surpass and omit all notion of relations with a Maker. For much religion nowadays has done more than escape from churches. It has escaped also from theology. It is still possible for Billy Sunday to state that Jesus hates a pacifist. But many men take responsibility for their beliefs themselves instead of putting it upon a deity.

Do beliefs so self-shouldered lose sanctity? Must the conduct which flows from them do without the constitutional protection which would unquestionably attach were they arbitrarily associated with divine revelation?

> "'He believes in No-God, and he worships him,' said a colleague of mine of a student who was manifesting a fine atheistic ardor; and the most fervent opponents of Christian doctrine have often enough shown a temper which, psychologically considered, is indistinguishable from religious zeal."
>
> William James, The Varieties of Religious Experience, page 35.

It is the psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.

The framers knew something of fanaticism, intolerance and persecution. They realized that under stress of conviction as to matters of pre-eminent import, even the wisest, most sincere and most humane sometimes lose sight of their own human fallibility and see no wrong in forcing others to walk in paths of which they themselves feel sure. And they intended that under a government founded upon the proposition that men are entitled to life, liberty, and happiness if they can find it, no man's soul should be shamed or aroused as, for example, a Roman Catholic's would be by statutory compulsion to defile the image of the Virgin. They were dealing for time to come with matter of substance, not with externalities. At a time when Protestant Christianity was practically universal, contemporary utterances as to freedom of conscience were naturally as a rule colored by allusions to the church and the Deity. But these utterances clearly intimate that the substance of freedom of conscience was perceived and intended. Jefferson, for example, in his address to the Danbury Baptist Association (8 Jefferson's Works, 13; quoted in *Reynolds vs. U. S.*, 98 U. S., 145, at 164), said this (italics ours):

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes

> account to none other for his faith and worship; *that the legislative powers of the government reach actions only, not opinions,*—I contemplate with sovereign reverence that act of the whole American people which declared that their Congress should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."

Chief Justice Waite's interpretation of this utterance is as follows:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. *Congress was deprived of all legislative power over mere opinion*, but was left free to reach actions which were in violation of social duties or subversive good order."

Another statement of Jefferson's (1 Works, 45; also quoted in *Reynolds vs. U. S.*, at page 163) is still more clear-cut and illuminating. This was in the preamble to the Virginia bill "for establishing religious freedom," which he drew in 1785:

> "To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty."

The view that the framers of the Constitution meant to protect the *right to think and believe*, regardless of association

with church or Deity, is thus supported by contemporary evidence as well as by sensible inference. And since a man's religion is thus in effect synonymous with the beliefs he holds sacred, an *exercise of religion* occurs whenever he does or refrains from doing anything whatever by reason of belief and under penalty of spiritual self-disgrace.

The religious character of faith or conduct is not affected by its reasonableness or probable or possible rightness. Faith springing from instinct, tradition, or superstition may be as sacred as that which springs from the reasoning processes of well-informed intelligence. For, since everything human is fallible, there is no authoritative criterion of the rightness of anything. The blindest arbitrary assumption has at least the chance of being as right as reason. For reason itself in the last analysis only guesses. It guesses not only at conclusions of conduct, but also at the diagnosis of determining conditions and the appraisal of the relative weight of facts—as for example those bearing upon the precise nature and proximity and relative seriousness of foreign and domestic menaces of oppression or military autocracy.

The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces.

American participation in the war is superlatively an exercise of religion in this sense. The depth and fervor of conviction in ordinary men and women as well as in the President and other statesmen must at times move even those who profoundly disagree.

Conscientious refusal to take part in the war is equally an exercise of religion. He who believes in democracy and more democracy as the means of carving out for populations as well as for favored individuals the possibility of good lives, and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by the

war, may believe that he cannot put on a uniform and go out to kill and die without a shame at least as deep as that of his fellow citizen whose spirit was abased because America held off for so long. And the shame of both is the same kind of shame as that of the Protestant renegade who denied his faith at the doors of the Inquisition.

It is recognized that the right to conform conduct to conscience is subject to the limitation declared in the Mormon cases—that the conduct must not be such as to outrage the moral sense of the community. Works of death in general shock that moral sense. That is why passionate advocates of war were on their part denied free exercise of religion until the Act of Congress, declaring war, had changed morality.

Can it be that this Act of Congress has not only changed, but completely reversed morality? It will not be held that views shared in December, 1916, with a President whose authority to represent the moral sense of the people had just been demonstrated by an election, have become so outrageous that their holders are outlawed, and must now submit as their various temperaments may direct to such processes of extinction as the mobs and governments of their country shall from time to time administer.

CONCLUSION.

At this time of hyper-religious intensity of faith and feeling, it has been seriously advanced by eminent men, without thought of disrespect, that it may be a "higher duty" of this Court, under some sort of "unwritten law," to disregard the Constitution. Ex-Senator Elihu Root, for example, in an address before the Conference of Bar Associations (reprinted in the West Publishing Company's Docket for November, 1917) said this:

> "What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. This has to be vested in the military commander in order to carry on war successfully. *You cannot have free democracy and successful war at the same moment.* The inevitable conclusion is that, if you have to live in the presence of a great, powerful military autocracy as your neighbor, you cannot maintain your democracy."

There is no reason why the answer which this Court gave to such reasoning in Civil War times should not hold now:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."
>
> *Ex Parte Milligan*, 4 Wall. 2.

The time has not come yet for America to declare that freedom is a failure.

Respectfully submitted,

WALTER NELLES,
Counsel for Plaintiffs in Error in Conscription Act cases not advanced, and for the National Civil Liberties Bureau, Amicus Curiae,

70 Fifth Avenue, New York.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 663.

JOSEPH F. ARVER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 7, 1917.

(26,130)

(26,130)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1917.

1 United States District Court, District of Minnesota, Third Division.

No. 317.

THE UNITED STATES, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Pleas Before the Honorable the Judges of the United States District Court for the District of Minnesota.

June Term, A. D. 1917.

No. 317.

THE UNITED STATES, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Be it remembered, that on the 8th day of June, A. D. 1917, the Grand Jury of the United States of America in and for the District of Minnesota, Third Division, presented against Joseph F. Arver, the defendant in the above entitled cause, their True Bill of Indictment in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Third Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of St. Paul, within and for the District and Division aforesaid, on the first Tuesday in June, being the fifth day of June, in the year of our Lord one thousand nine hundred and seventeen, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

2 UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that heretofore, to wit: on the fifth day of June, A. D. 1917, at the City of St. Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, one Joseph

F. Arver, then and there being, late of said District, did then and there wrongfully, and unlawfully wilfully fail and refuse to register, and to present himself for registration, as required by Section five of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19, 1917, designating June 5, 1917, as registration day, and the regulations prescribed by the President; he, the said Joseph F. Arver being then and there a male person between the ages of twenty-one and thirty years, both inclusive, and being then and there subject to registration, and not being an officer and enlisted man of the Regular Army, the Navy, the National Guard or Naval Militia while in the service of the United States; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

J. M. DICKEY,
Assistant United States Attorney.

(Endorsed:) Indictment. A True Bill. P. K. Gilfillan, Foreman of the Grand Jury. Names of Witnesses examined before the Grand Jury, Irving Best, L. C. Hodgson, T. E. Campbell, L. U. Spehr. Alfred Jaques, United States Attorney. Filed June 8th, 1917. Charles L. Spencer, Clerk.

3 And thereafter, and on the 5th day of July, A. D. 1917, certain proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1917.

July 5th, 1917.

Court opened pursuant to adjournment.

Present: Honorable Page Morris, Judge.

The United States of America, Plaintiff,

against

Joseph F. Arver, Defendant.

Judgment and Sentence.

Now, on this 5th day of July, A. D. 1917, the United States Attorney for the District of Minnesota, and the defendant in the above entitled action, Joseph F. Arver, in his own proper person, come into open court, and the said United States Attorney moves the Court that judgment be now rendered against and sentence pro-

nounced upon said defendant in accordance with the verdict, heretofore duly rendered by a jury and entered in said action that said defendant is guilty as charged in the indictment in said action against said defendant for the crime of having wrongfully and unlawfully, wilfully failed and refused to register and present himself for registration as required by Section 5 of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," committed at St. Paul, in the County of Ramsey, in the State and District of Minnesota, on the 5th day of June, A. D. 1917; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor any one for him says anything in arrest thereof; whereupon, in accordance with said verdict,

it is by the Court

4 Considered and adjudged that said defendant is guilty of the crime aforesaid and that as punishment therefor said defendant be confined in the Minnesota State Reformatory, in said State, situated at St. Cloud, Minnesota, for the term of one (1) year and until he shall have been discharged from said reformatory by due course of law.

And thereafter, and on the 9th day of August, A. D. 1917, a certain bill of exceptions was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

5 United States District Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Bill of Exceptions.

Be it remembered that on the 8th day of June, 1917, at the City of Saint Paul, State of Minnesota, the Grand Jury of the United States of America within and for said District being duly empaneled, sworn and charged to inquire within and for said District of Minnesota, in the name and by the authority of the United States of America, upon their oaths did find and present as a true bill, an indictment charging that the above named defendant, Joseph F. Arver, did wilfully fail and refuse to register and to present himself for registration as required by Section five of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military establishment of the United States," and the Proclamation of the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

That thereafter, on the 11th day of June, 1917, at such place said defendant Joseph F. Arver appeared in person and by his attorney T. E. Latimer, Esq., before the Honorable Page Morris, Judge of said Court, and being duly arraigned, thereupon entered
6 his plea to the said indictment herein, through his attorney, and did say that he is not guilty in manner and form as in and by said indictment he stands charged.

That thereupon the court ordered that defendant be given until two P. M. on the 13th day of June, 1917, to withdraw the said plea.

That thereafter on said 13th day of June, 1917, defendant Joseph F. Arver, and his counsel, T. E. Latimer, Esq., appeared before the bar of this court and withdrew his plea of not guilty by leave of court, and did then and there demur to said indictment upon the following grounds, to-wit:

1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the Regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the 13th Amendment to the Constitution of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section one of Article One, and Section eight of Article One, of the Constitution of the United States of America, and therefore null and void.

That thereafter, on the 22nd day of June, 1917, the argument of said demurrer was heard before the Honorable Wilbur F. Booth, Judge of said Court; Defendant appearing by Herbert L. Dunn, and T. E. Latimer, his attorneys, and plaintiff, appearing by Alfred Jacques, Esq., United States District Attorney for the District of Minnesota; and having been submitted and duly and maturely considered by the Court, the court ordered: That the said demurrer to the indictment be and hereby is overruled, to which ruling the defendant did then and there duly except, and said exception was allowed by the court.

7 That thereupon defendant did again plead not guilty to said indictment, and the court set his trial for the 2nd day of July, 1917, and 10 O'clock A. M.

Thereafter, on the 2nd Day of July, 1917, at 10 O'clock A. M. said cause was called for trial before the Honorable Page Morris, Judge of said Court, and a jury of twelve good and lawful men, and the said plaintiff appearing by its attorney Alfred Jacques, Esq., and the defendant appearing by his attorneys, T. E. Latimer, Esq., and Herbert L. Dunn, Esq., and Herman W. Phillips, Esq., the following proceedings were had, that is to say:

Plaintiff introduced its evidence, and defendant rested without presenting any, whereupon the court charged the jury, and the jury retired, and brought in a verdict of guilty as charged in the indictment.

Thereupon judgment was rendered, and defendant sentenced to

confinement for the period of one year in the County Jail of Ramsey County, Minnesota.

Thereafter on July 5th, 1917, defendant appearing in person and by his said counsel before the said trial Court, the said judgment and sentence were in all things vacated and set aside, and thereupon the court rendered judgment and sentenced defendant to confinement in the Minnesota State Reformatory at St. Cloud, Minnesota, for the period of one year.

It is hereby stipulated between the parties to this cause that the above and foregoing may be settled, allowed and signed by the Judge of this Court, and filed as the Bill of Exceptions in this cause.

Dated this 8 day of August, 1917.

ALFRED JAQUES,
U. S. Attorney,
Attorney for Plaintiff.
T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

8 Pursuant to the foregoing stipulation, tendering the above as the Bill of Exceptions reserved by defendant upon the trial of this cause, I hereby allow the same this 9th day of August, A. D. 1917.

PAGE MORRIS,
Judge of the United States District Court,
District of Minnesota.

(Endorsed:) Bill of Exceptions. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain assignment of error and prayer for reversal was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

9 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Assignment of Error and Prayer for Reversal.

The defendant in this action in connection with his petition for a Writ of Error, makes and files the following assignment of error, which he avers occurred upon the trial of the cause, to-wit:

1.

The court erred in overruling the demurrer of the defendant to the indictment.

Wherefore, the defendant for the error aforesaid prays that the judgment herein may be reversed, vacated and held for naught and that said defendant may be restored in all things to that which he has lost thereby.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Assignment of Error and Prayer for Reversal. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain petition for writ of error was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

10 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Petition for Writ of Error.

And now comes Joseph F. Arver, defendant herein, and says that on or about the fifth day of July, A. D. 1917, this Court entered judgment and sentence herein against this defendant, in which judgment, sentence and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Petition for Writ of Error. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain order allowing writ of error and fixing bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

11 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Order Allowing Writ of Error and Fixing Bond.

This 9th day of August, A. D. 1917, came the defendant by his attorney, and filed herein, and presented to the Court his petition, and assignments of error intended to be urged by him, praying for the allowance of a Writ of Error and that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law in the sum of one thousand dollars ($1000.00), which shall operate as an appearance bond.

PAGE MORRIS,
Judge of District Court of the United States, for the District of Minnesota.

(Endorsed:) Order allowing Writ of Error and fixing Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain appearance bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

12 *Appearance Bond.*

Know all men by these presents:

That we, Joseph F. Arver, as principal, and Julius Perlt and Charles J. Buell, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1000.00), to be paid to the United States of America, to which payment well — truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 8th day of August in the year of our Lord, 1917.

Whereas, lately at the June Term, A. D. 1917, of the District Court of the United States, for the District of Minnesota, in a suit pending in said Court between the United States of America, plaintiff, and Joseph F. Arver, defendant, a judgment and sentence ren-

dered against the said defendant, Joseph F. Arver, and the said Joseph F. Arver has obtained a writ of Error from the Supreme Court of the United States, to reverse the judgment and sentence in the aforesaid cause, and a citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served. Now the condition of the above obligation is such that if the said Joseph F. Arver, shall appear either in person or by attorney in the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for
13 the District of Minnesota, Third Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then the above obligation shall be void, otherwise to remain in full force, virtue and effect.

JOSEPH F. ARVER.
JULIUS PERLT.
CHARLES J. BUELL.

Signed, Sealed and Delivered in the Presence of

F. RATHSMANN.
FRED MILLER.

STATE OF MINNESOTA,
County of Ramsey, ss:

Be it known, that on this 8th day of August, A. D. 1917, came before me personally Joseph F. Arver, Julius Perlt and Charles J. Buell to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission expires January 31, 1918.

STATE OF MINNESOTA,
County of Ramsey, ss:

Julius Perlt and Charles J. Buell, upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the

amount of two thousand dollars, above his debts and liabilities, and exclusive of his property which is exempt from execution.

JULIUS PERLT.
CHARLES J. BUELL.

Subscribed and sworn to before me this 8th day of August, A. D. 1917.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission Expires January 31, 1918.

The foregoing bond is hereby approved this 9th day of August, 1917.

PAGE MORRIS,
Judge of the District Court of the United States,
District of Minnesota.

14 (Endorsed:) Appearance Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain citation, theretofore issued, was filed in the office of the Clerk of said Court in said cause which said citation here next follows:

15 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Citation.

United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court, for the District of Minnesota wherein Joseph F. Arver is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 9th day of August, A. D. 1917.

PAGE MORRIS,
Judge of the District Court of the United States
for the District of Minnesota.

Due service of the foregoing citation upon me at St. Paul, Minnesota, on the 9th day of August, 1917, is hereby admitted.

ALFRED JAQUES,
United States Attorney and
Attorney for Plaintiff.

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk U. S. District Court, District of Minnesota.

16 And thereafter, and on the same day, a certain praecipe for transcript of record was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

17 The District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

Praecipe for Transcript of Record.

To the Clerk:

You are requested to make and forward a transcript of record to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in the above entitled cause and to include in such transcript of record the following and no other copies of papers, to-wit:

1. Indictment.
2. Judgment and sentence.
3. Bill of Exceptions.
4. Assignments of Error.
5. Petition for Writ of Error.
6. Order allowing Writ of Error and Fixing Bond.
7. Appearance Bond on Writ of Error.
8. This Praecipe for transcript of record.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Praecipe for Transcript of Record. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a writ of error from the Supreme Court of the United States was filed in the office of the Clerk of said Court in said cause, which said writ of error and certificate of obedience thereto here next follows:

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Third Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the June Term, 1917, thereof, between The United States of America, Plaintiff and Joseph F. Arver, Defendant, manifest error hath happened, to the great damage of the said Joseph F. Arver as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 8th day of September, 1917, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 9th day of August, A. D. 1917.

Issued at office in St. Paul, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

Allowed by

PAGE MORRIS, *Judge.*

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk, U. S. District Court, District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript

of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

19 United States District Court, District of Minnesota, Third Division.

No. 317.

THE UNITED STATES, Plaintiff,

vs.

JOSEPH F. ARVER, Defendant.

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 17 pages, numbered consecutively from 1 to 17, inclusive, is a true and complete transcript of all the records, process, pleadings, orders, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court, and in accordance with a precipe for such transcript, a copy whereof is included within said transcript; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid, and affixed the seal of said Court, at St. Paul, in the District of Minnesota, this 11th day of August, A. D. 1917.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER, *Clerk*.

20 [Endorsed:] United States District Court, District of Minnesota, Third Division. No. 317. The United States vs. Joseph F. Arver. Transcript of Record on Writ of Error.

Endorsed on cover: File No. 26,130. Minnesota D. C. U. S. Term No. 663. Joseph F. Arver, plaintiff in error, vs. The United States of America. Filed September 7th, 1917. File No. 26,130.

CLERK'S COPY,

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 664.

ALFRED F. GRAHL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 7, 1917.

(26,131)

(26,131)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 664.

ALFRED F. GRAHL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1917.

1 United States District Court, District of Minnesota, Third Division.

No. 318.

THE UNITED STATES, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Pleas Before the Honorable the Judges of the United States District Court for the District of Minnesota.

June Term, A. D. 1917.

No. 318.

THE UNITED STATES, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Be it remembered, that on the 8th day of June, A. D. 1917, the Grand Jury of the United States of America in and for the District of Minnesota, Third Division, presented against Joseph F. Arver, the defendant in the above entitled cause, their True Bill of Indictment in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Third Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of St. Paul, within and for the District and Division aforesaid, on the first Tuesday in June, being the fifth day of June, in the year of our Lord one thousand nine hundred and seventeen, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

2 UNITED STATES OF AMERICA.
District of Minnesota, Third Division, set:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that heretofore, to wit: on the fifth day of June, A. D. 1917, at the City of St. Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, one Alfred

F. Grahl, then and there being, late of said District, did then and there wrongfully, and unlawfully wilfully fail and refuse to register, and to present himself for registration, as required by Section five of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United, States," and the Proclamation by the President of the United States under date of May 19, 1917, designating June 5, 1917, as registration day, and the regulations prescribed by the President; he, the said Alfred F. Grahl being then and there a male person between the ages of twenty-one and thirty years, both inclusive, and being then and there subject to registration, and not being an officer and enlisted man of the Regular Army, the Navy, the National Guard or Naval Militia while in the service of the United States; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

J. M. DICKEY,
Assistant United States Attorney.

(Endorsed:) Indictment. A True Bill. P. K. Gilfillan, Foreman of the Grand Jury. Names of Witnesses examined before the Grand Jury, James H. Daley, L. C. Hodgson, T. E. Campbell, Alfred Jaques, United States Attorney. Filed June 8th, 1917. Charles L. Spencer, Clerk.

3 And thereafter, and on the 5th day of July, A. D. 1917, certain proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1917.

July 5th, 1917.

Court opened pursuant to adjournment.

Present: Honorable Page Morris, Judge.

The United States of America, Plaintiff,

against

Alfred F. Grahl, Defendant.

Judgment and Sentence.

Now, on this 5th day of July, A. D. 1917, the United States Attorney for the District of Minnesota, and the defendant in the above entitled action, Alfred F. Grahl, in his own proper person, come into open court, and the said United States Attorney moves

the Court that judgment be now rendered against and sentence pronounced upon said defendant in accordance with the verdict, heretofore duly rendered by a jury and entered in said action that said defendant is guilty as charged in the indictment in said action against said defendant for the crime of having wrongfully and unlawfully, wilfully failed and refused to register and present himself for registration as required by Section 5 of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," committed at St. Paul, in the County of Ramsey, in the State and District of Minnesota, on the 5th day of June, A. D. 1917; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor any one for him says anything in arrest thereof; whereupon, in accordance with said verdict,

it is by the Court

4 Considered and adjudged that said defendant is guilty of the crime aforesaid and that as punishment therefor said defendant be confined in the Minnesota State Reformatory, in said State, situated at St. Cloud, Minnesota, for the term of one (1) year and until he shall have been discharged from said reformatory by due course of law.

And thereafter, and on the 9th day of August, A. D. 1917, a certain bill of exceptions was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

5 United States District Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Bill of Exceptions.

Be it remembered that on the 8th day of June, 1917, at the City of Saint Paul, State of Minnesota, the Grand Jury of the United States of America within and for said District being duly empaneled, sworn and charged to inquire within and for said District of Minnesota, in the name and by the authority of the United States of America, upon their oaths did find and present as a true bill, an indictment charging that the above named defendant, Alfred F. Grahl, did wilfully fail and refuse to register and to present himself for registration as required by Section five of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military establishment of the United States," and the Proclamation of the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

That thereafter, on the 11th day of June, 1917, at such place said defendant Alfred F. Grahl appeared in person and by his attorney T. E. Latimer, Esq., before the Honorable Page Morris, Judge of said Court, and being duly arraigned, stated that his true
6 name was Alfred F. Grahl, and thereupon entered his plea to the said indictment herein, through his attorney, and did say that he is not guilty in manner and form as in and by said indictment he stands charged.

That thereupon the court ordered that defendant be given until two P. M. on the 13th day of June, 1917, to withdraw the said plea.

That thereafter on said 13th day of June, 1917, defendant Alfred F. Grahl, and his counsel, T. E. Latimer, Esq., appeared before the bar of this court and withdrew his plea of not guilty by leave of court, and did then and there demur to said indictment upon the following grounds, to-wit:

1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the Regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the 13th Amendment to the Constitution of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section one of Article One, and Section eight of Article One, of the Constitution of the United States of America, and therefore null and void.

That thereafter, on the 22nd day of June, 1917, the argument of said demurrer was heard before the Honorable Wilbur F. Booth, Judge of said Court; Defendant appearing by Herbert L. Dunn, and T. E. Latimer, his attorneys, and plaintiff, appearing by Alfred Jacques, Esq., United States District Attorney for the District of Minnesota; and having been submitted and duly and maturely considered by the Court, the court ordered: That the said demurrer to the indictment be and hereby is overruled, to which ruling the defendant did then and there duly except, and said exception was allowed by the court.

7 That thereupon defendant did again plead not guilty to said indictment, and the court set his trial for the 2nd day of July, 1917, at 10 O'clock A. M.

Thereafter, on the 2nd Day of July, 1917, at 10 O'clock A. M. said cause was called for trial before the Honorable Page Morris, Judge of said Court, and a jury of twelve good and lawful men, and the said plaintiff appearing by its attorney Alfred Jacques, Esq., and the defendant appearing by his attorneys, T. E. Latimer, Esq., and Herbert L. Dunn, Esq., and Hermon W. Phillips, Esq., the following proceedings were had, that is to say:

Plaintiff introduced its evidence, and defendant rested without presenting any, whereupon the court charged the jury, and the jury retired, and brought in a verdict of guilty as charged in the indictment.

Thereupon judgment was rendered, and defendant sentenced to confinement for the period of one year in the County Jail of Ramsey County, Minnesota.

Thereafter on July 5th, 1917, defendant appearing in person and by his said counsel before the said trial Court, the said judgment and sentence were in all things vacated and set aside, and thereupon the court rendered judgment and sentenced defendant to confinement in the Minnesota State Reformatory at St. Cloud, Minnesota, for the period of one year.

It is hereby stipulated between the parties to this cause that the above and foregoing may be settled, allowed and signed by the Judge of this Court, and filed as the Bill of Exceptions in this cause.

Dated this 8 day of August, 1917.

ALFRED JAQUES,
U. S. Attorney,
Attorney for Plaintiff.
T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

8 Pursuant to the foregoing stipulation, tendering the above as the Bill of Exceptions reserved by defendant on the trial of this cause, I hereby allow the same this 9th day of August, 1917.

PAGE MORRIS,
Judge of the United States District Court,
District of Minnesota.

(Endorsed:) Bill of Exceptions. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain assignment of error and prayer for reversal was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

9 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Assignment of Error and Prayer for Reversal.

The defendant in this action in connection with his petition for a Writ of Error, makes and files the following assignment of error, which he avers occurred upon the trial of the cause, to-wit:

1.

The court erred in overruling the demurrer of the defendant to the indictment,

Wherefore, the defendant for the error aforesaid prays that the judgment herein may be reversed, vacated and held for naught and that said defendant may be restored in all things to that which he has lost thereby.

T. E. LATIMER AND
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Assignment of Error and Prayer for Reversal. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain petition for writ of error was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

10 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Petition for Writ of Error.

And now comes Alfred F. Grahl, defendant herein, and says that on or about the fifth day of July, A. D. 1917, this Court entered judgment and sentence herein against this defendant, in which judgment, sentence and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Petition for Writ of Error. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain order allowing writ of error and fixing bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

11 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Order Allowing Writ of Error and Fixing Bond.

This 9th day of August, A. D. 1917, came the defendant by his attorney, and filed herein, and presented to the Court his petition, and assignments of error intended to be urged by him, praying for the allowance of a Writ of Error and that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law in the sum of one thousand dollars ($1000.00), which shall operate as an appearance bond.

PAGE MORRIS,
Judge of District Court of the United States for the District of Minnesota.

(Endorsed:) Order allowing Writ of Error and fixing Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain appearance bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

12 *Appearance Bond.*

Know all men by these presents:

That we, Alfred F. Grahl, as principal, and August Prohofsky and Frank A. Webster, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1000.00), to be paid to the United States of America, to which payment well — truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 8th day of August in the year of our Lord, 1917.

Whereas, lately at the June Term, A. D. 1917, of the District Court of the United States, for the District of Minnesota, in a suit pending in said Court between the United States of America, plaintiff, and Alfred F. Grahl, defendant, a judgment and sentence ren-

dered against the said defendant, Alfred F. Grahl, and the said Alfred F. Grahl has obtained a writ of Error from the Supreme Court of the United States, to reverse the judgment and sentence in the aforesaid cause, and a Citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served. Now the condition of the above obligation is such that if the said Alfred F. Grahl, shall appear either in person or by attorney in the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for
13 the District of Minnesota, Third Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then the above obligation shall be void, otherwise to remain in full force, virtue and effect.

ALFRED F. GRAHL.
AUGUST PROHOFSKY.
FRANK A. WEBSTER.

Signed, Sealed and Delivered in the Presence of
F. RATHSMANN.
FRED MILLER.

STATE OF MINNESOTA,
County of Ramsey, ss:

Be it known, that on this 8th day of August, A. D. 1917, came before me personally Alfred F. Grahl, August Prohofsky and Frank A. Webster to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] FRED MILLER.
Notary Public, Ramsey County, Minn.

My Commission expires January 31, 1918.

STATE OF MINNESOTA,
County of Ramsey, ss:

August Prohofsky and Frank A. Webster, upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the amount of two thousand dollars, above his debts and

liabilities, and exclusive of his property which is exempt from execution.

AUGUST PROHOFSKY.
FRANK A. WEBSTER.

Subscribed and sworn to before me this 8th day of August, A. D. 1917.

[NOTARIAL SEAL.] FRED MILLER.
Notary Public, Ramsey County, Minn.

My Commission Expires January 31, 1918.

The foregoing bond is hereby approved this 9th day of August, 1917.

PAGE MORRIS,
Judge of the District Court of the United States,
District of Minnesota.

14 (Endorsed:) Appearance Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain citation, theretofore issued, was filed in the office of the Clerk of said Court in said cause which said citation here next follows:

15 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Citation.

United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court, for the District of Minnesota, wherein Alfred F. Grahl is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 9th day of August, A. D. 1917.

PAGE MORRIS,
Judge of the District Court of the United States
for the District of Minnesota.

Due service of the foregoing citation upon me at St. Paul, Minnesota, on the 9th day of August, 1917, is hereby admitted.

ALFRED JAQUES,
United States Attorney and
Attorney for Plaintiff.

Filed August 9th, 1917.
CHARLES L. SPENCER,
Clerk, U. S. District Court, District of Minnesota.

16 And thereafter, and on the same day, a certain præcipe for transcript of record was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

17 The District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

Præcipe for Transcript of Record.

To the Clerk:

You are requested to make and forward a transcript of record to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in the above entitled cause and to include in such transcript of record the following and no other copies of papers, to-wit:

1. Indictment.
2. Judgment and sentence.
3. Bill of Exceptions.
4. Assignments of Error.
5. Petition for Writ of Error.
6. Order allowing Writ of Error and Fixing Bond.
7. Appearance Bond on Writ of Error.
8. This Præcipe for transcript of record.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Præcipe for Transcript of Record. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a writ of error from the Supreme Court of the United States was filed in the office of the Clerk of said Court in said cause, which said writ of error and certificate of obedience thereto here next follows:

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Third Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the June Term, 1917, thereof, between The United States of America, Plaintiff and Alfred F. Grahl, Defendant, manifest error hath happened, to the great damage of the said Alfred F. Grahl as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 8th day of September, 1917, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 9th day of August, A. D. 1917.

Issued at office in St. Paul, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

Allowed by

PAGE MORRIS, *Judge.*

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk, U. S. District Court, District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

19 United States District Court, District of Minnesota, Third Division.

No. 318.

THE UNITED STATES, Plaintiff,

vs.

ALFRED F. GRAHL, Defendant.

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 17 pages, numbered consecutively from 1 to 17, inclusive, is a true and complete transcript of all the records, process, pleadings, orders, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court, and in accordance with a praecipe for such transcript, a copy whereof is included within said transcript; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid, and affixed the seal of said Court, at St. Paul, in the District of Minnesota, this 11th day of August, A. D. 1917.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER, *Clerk.*

20 [Endorsed:] United States District Court, District of Minnesota, Third Division. No. 318. The United States vs. Alfred F. Grahl. Transcript of Record on Writ of Error.

Endorsed on cover: File No. 26,131. Minnesota D. C. U. S. Term No. 664. Alfred F. Grahl, plaintiff in error, vs. The United States of America. Filed September 7th, 1917. File No. 26,131.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 665.

OTTO WANGERIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 7, 1917.

(26,132)

(26,132)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 665.

OTTO WANGERIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1917.

1 United States District Court, District of Minnesota, Third Division.

No. 320.

THE UNITED STATES, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Pleas Before the Honorable the Judges of the United States District Court for the District of Minnesota.

June Term, A. D. 1917.

No. 320.

THE UNITED STATES, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Be it remembered, that on the 8th day of June, A. D. 1917, the Grand Jury of the United States of America in and for the District of Minnesota, Third Division, presented against Otto Wangerin, the defendant in the above entitled cause, their True Bill of Indictment in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Third Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of St. Paul, within and for the District and Division aforesaid, on the first Tuesday in June, being the fifth day of June, in the year of our Lord one thousand nine hundred and seventeen, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

2 UNITED STATES OF AMERICA.
District of Minnesota, Third Division, ss:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that heretofore, to wit: on the fifth day of June, A. D. 1917, at the City of St. Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, one Otto

Wangerin, then and there being, late of said District, did then and there wrongfully, and unlawfully wilfully fail and refuse to register, and to present himself for registration, as required by Section five of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19, 1917, designating June 5, 1917, as registration day, and the regulations prescribed by the President; he, the said Otto Wangerin being then and there a male person between the ages of twenty-one and thirty years, both inclusive, and being then and there subject to registration, and not being an officer and enlisted man of the Regular Army, the Navy, the National Guard or Naval Militia while in the service of the United States; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

J. M. DICKEY,
Assistant United States Attorney.

(Endorsed:) Indictment. A True Bill. P. K. Gilfillan, Foreman of the Grand Jury. Names of Witnesses examined before the Grand Jury, James H. Daley, L. C. Hodgson, T. E. Campbell. Alfred Jaques, United States Attorney. Filed June 8th, 1917. Charles L. Spencer, Clerk.

3 And thereafter, and on the 5th day of July, A. D. 1917, certain proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1917.

JULY 5th, 1917.

Court opened pursuant to adjournment.

Present: Honorable Page Morris, Judge.

THE UNITED STATES OF AMERICA, Plaintiff,

against

OTTO WANGERIN, Defendant.

Judgment and Sentence.

Now, on this 5th day of July, A. D. 1917, the United States Attorney for the District of Minnesota, and the defendant in the above entitled action, Otto Wangerin, in his own proper person, come into open court, and the said United States Attorney moves the Court that judgment be now rendered against and sentence pro-

nounced upon said defendant in accordance with the verdict, heretofore duly rendered by a jury and entered in said action that said defendant is guilty as charged in the indictment in said action against said defendant for the crime of having wrongfully and unlawfully, wilfully failed and refused to register and present himself for registration as required by Section 5 of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," committed at St. Paul, in the County of Ramsey, in the State and District of Minnesota, on the 5th day of June, A. D. 1917; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor any one for him says anything in arrest thereof; whereupon, in accordance with said verdict,

it is by the Court

4 Considered and adjudged that said defendant is guilty of the crime aforesaid and that as punishment therefor said defendant be confined in the Minnesota State Reformatory, in said State, situated at St. Cloud, Minnesota, for the term of one (1) year and until he shall have been discharged from said reformatory by due course of law.

And thereafter, and on the 9th day of August, A. D. 1917, a certain bill of exceptions was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

5 United States District Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Bill of Exceptions.

Be it remembered that on the 8th day of June, 1917, at the City of Saint Paul, State of Minnesota, the Grand Jury of the United States of America within and for said District being duly empaneled, sworn and charged to inquire within and for said District of Minnesota, in the name and by the authority of the United States of America, upon their oaths did find and present as a true bill, an indictment charging that the above named defendant, Otto Wangerin, did wilfully fail and refuse to register and to present himself for registration as required by Section five of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military establishment of the United States," and the Proclamation of the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

That thereafter, on the 11th day of June, 1917, at such place said defendant Otto Wangerin, appeared in person and by his attorney T. E. Latimer, Esq., before the Honorable Page Morris, Judge of said Court, and being duly arraigned, thereupon entered
6 his plea to the said indictment herein, through his attorney, and did say that he is not guilty in manner and form as in and by said indictment he stands charged.

That thereupon the court ordered that defendant be given until two P. M. on the 13th day of June, 1917, to withdraw the said plea.

That thereafter on said 13th day of June, 1917, defendant Otto Wangerin, and his counsel, T. E. Latimer, Esq., appeared before the bar of this court and withdrew his plea of not guilty by leave of court, and did then and there demur to said indictment upon the following grounds, to-wit:

1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the Regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the 13th Amendment to the Constitution of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section one of Article One, and Section eight of Article One, of the Constitution of the United States of America, and therefore null and void.

That thereafter, on the 22nd day of June, 1917, the argument of said demurrer was heard before the Honorable Wilbur F. Booth, Judge of said Court; Defendant appearing by Herbert L. Dunn, and T. E. Latimer, his attorneys, and plaintiff, appearing by Alfred Jacques, Esq., United States District Attorney for the District of Minnesota; and having been submitted and duly and maturely considered by the Court, the court ordered: That the said demurrer to the indictment be and hereby is overruled, to which ruling the defendant did then and there duly except, and said exception was allowed by the court.

7 That thereupon defendant did again plead not guilty to said indictment, and the court set his trial for the 2nd day of July, 1917, at 10 O'clock A. M.

Thereafter, on the 2nd Day of July, 1917, at 10 O'clock A. M. said cause was called for trial before the Honorable Page Morris, Judge of said Court, and a jury of twelve good and lawful men, and the said plaintiff appearing by its attorney Alfred Jacques, Esq., and the defendant appearing by his attorneys, T. E. Latimer, Esq., and Herbert L. Dunn, Esq., and Herman W. Phillips, Esq., the following proceedings were had, that is to say:

Plaintiff introduced its evidence, and defendant rested without presenting any, whereupon the court charged the jury, and the jury retired, and brought in a verdict of guilty as charged in the indictment.

Thereupon judgment was rendered, and defendant sentenced to

ıfinement for the period of one year in the County Jail of Ram- County, Minnesota.

Thereafter on July 5th, 1917, defendant appearing in person and his said counsel before the said trial Court, the said judgment d sentence were in all things vacated and set aside, and thereupon court rendered judgment and sentenced defendant to confine- nt in the Minnesota State Reformatory at St. Cloud, Minnesota, the period of one year.

It is hereby stipulated between the parties to this cause that the ove and foregoing may be settled, allowed and signed by the Judge this Court, and filed as the Bill of Exceptions in this cause.

Dated this 8 day of August, 1917.

ALFRED JAQUES,
U. S. Attorney,
Attorney for Plaintiff.
T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

Pursuant to the foregoing stipulation, tendering the above as the Bill of Exceptions reserved by defendant upon the trial this cause, I hereby allow the same this 9th day of August, A. D. 917.

PAGE MORRIS,
Judge of the United States District Court,
District of Minnesota.

(Endorsed:) Bill of Exceptions. Filed August 9th, 1917. Charles Spencer, Clerk.

And thereafter, and on the same day, a certain assignment of ror and prayer for reversal was filed in the office of the Clerk of id Court in said cause in the words and figures following, to-wit:

District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Assignment of Error and Prayer for Reversal.

The defendant in this action in connection with his petition for Writ of Error, makes and files the following assignment of error, hich he avers occurred upon the trial of the cause, to-wit:

1.

The court erred in overruling the demurrer of the defendant to the indictment.

Wherefore, the defendant for the error aforesaid prays that the judgment herein may be reversed, vacated and held for naught and that said defendant may be restored in all things to that which he has lost thereby.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Assignment of Error and Prayer for Reversal. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain petition for writ of error was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

10 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Petition for Writ of Error.

And now comes Otto Wangerin, defendant herein, and says that on or about the fifth day of July, A. D. 1917, this Court entered judgment and sentence herein against this defendant, in which judgment, sentence and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Petition for Writ of Error. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain order allowing writ of error and fixing bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

11 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Order Allowing Writ of Error and Fixing Bond.

This 9th day of August, A. D. 1917, came the defendant by his attorney, and filed herein, and presented to the Court his petition, praying for the allowance of a Writ of Error, also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law in the sum of one thousand dollars ($1000.00), which shall operate as an appearance bond.

PAGE MORRIS,
Judge of District Court of the United States for the District of Minnesota.

(Endorsed:) Order allowing Writ of Error and fixing Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain appearance bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

12 *Appearance Bond.*

Know all men by these presents:

That we, Otto Wangerin, as principal, and August Prohofsky and Frank A. Webster, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 8th day of August in the year of our Lord, 1917.

Whereas, lately at the June Term, A. D. 1917, of the District Court of the United States, for the District of Minnesota, in a suit pending in said Court between the United States of America, plaintiff, and Otto Wangerin, defendant, a judgment and sentence was rendered against the said defendant, Otto Wangerin, and the said

Otto Wangerin has obtained a Writ of Error from the Supreme Court of the United States, to reverse the judgment and sentence in the aforesaid cause, and a Citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served. Now the condition of the above obligation is such that if the said Otto Wangerin, shall appear either in person or by attorney in the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for
13 the District of Minnesota, Third Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then the above obligation shall be void, otherwise to remain in full force, virtue and effect.

OTTO WANGERIN.
AUGUST PROHOFSKY.
FRANK A. WEBSTER.

Signed, Sealed and Delivered in the Presence of

F. RATHSMANN.
FRED MILLER.

STATE OF MINNESOTA,
County of Ramsey, ss:

Be it known, that on this 8th day of August, A. D. 1917, came before me personally Otto Wangerin, August Prohofsky and Frank A. Webster to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission expires January 31, 1918.

STATE OF MINNESOTA,
County of Ramsey, ss:

August Prohofsky and Frank A. Webster, upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth

the amount of two thousand dollars, above his debts and liabilities, and exclusive of his property which is exempt from execution.

AUGUST PROHOFSKY.
FRANK A. WEBSTER.

Subscribed and sworn to before me this 8th day of August, A. D. 1917.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission Expires January 31, 1918.

The foregoing bond is hereby approved this 9th day of August, 1917.

PAGE MORRIS,
Judge of the District Court of the United States,
District of Minnesota.

14 (Endorsed:) Appearance Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain citation, theretofore issued, was filed in the office of the Clerk of said Court in said cause which said citation here next follows:

15 The District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Citation.

United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date pursuant to a Writ of Error filed in the Clerk's office of the United States District Court, District of Minnesota, wherein Otto Wangerin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 9th day of August, A. D. 1917.

PAGE MORRIS,
Judge of the District Court of the United States
for the District of Minnesota.

Due service of the foregoing citation upon me at St. Paul, Minnesota, on the 9th day of August, 1917, is hereby admitted.

ALFRED JAQUES,
United States Attorney and
Attorney for Plaintiff.

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk U. S. District Court, District of Minnesota.

16 And thereafter, and on the same day, a certain præcipe for transcript of record was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

17 The District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

Præcipe for Transcript of Record.

To the Clerk:

You are requested to make and forward a transcript of record to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in the above entitled cause and to include in such transcript of record the following and no other copies of papers, to-wit:

1. Indictment.
2. Judgment and sentence.
3. Bill of Exceptions.
4. Assignments of Error.
5. Petition for Writ of Error.
6. Order allowing Writ of Error and Fixing Bond.
7. Appearance Bond on Writ of Error.
8. This Præcipe for transcript of record.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Præcipe for Transcript of Record. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a writ of error from the Supreme Court of the United States was filed in the office of the Clerk of said Court in said cause, which said writ of error and certificate of obedience thereto here next follows:

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Third Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the June Term, 1917, thereof, between The United States of America, Plaintiff, and Otto Wangerin, Defendant, manifest error hath happened, to the great damage of the said Otto Wangerin as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 8th day of September, 1917, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 9th day of August, A. D. 1917.

Issued at office in St. Paul, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

Allowed by
PAGE MORRIS, *Judge.*

Filed August 9th, 1917.
CHARLES L. SPENCER.
Clerk U. S. District Court, District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

19 United States District Court, District of Minnesota, Third Division.

No. 320.

THE UNITED STATES, Plaintiff,

vs.

OTTO WANGERIN, Defendant.

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 17 pages, numbered consecutively from 1 to 17, inclusive, is a true and complete transcript of all the records, process, pleadings, orders, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court, and in accordance with a præcipe for such transcript, a copy whereof is included within said transcript; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid, and affixed the seal of said Court, at St. Paul, in the District of Minnesota, this 11th day of August, A. D. 1917.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER, *Clerk.*

20 [Endorsed:] United States District Court. District of Minnesota. Third Division. No. 320. The United States vs. Otto Wangerin. Transcript of Record on Writ of Error.

Endorsed on cover: File No. 26,132. Minnesota D. C. U. S. Term No. 665. Otto Wangerin, plaintiff in error, vs. The United States of America. Filed September 7th, 1917. File No. 26,132.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 666.

WALTER WANGERIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 7, 1917.

(26,133)

(26,133)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 666.

WALTER WANGERIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1917.

1 United States District Court, District of Minnesota, Third Division.

No. 321.

THE UNITED STATES, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Pleas Before the Honorable the Judges of the United States District Court for the District of Minnesota.

June Term, A. D. 1917.

No. 321.

THE UNITED STATES, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Be it remembered, that on the 8th day of June, A. D. 1917, the Grand Jury of the United States of America in and for the District of Minnesota, Third Division, presented against Walter Wangerin, defendant in the above entitled cause, their True Bill of Indictment in the words and figures following, to-wit:

The District Court of the United States of America for the District of Minnesota, Third Division.

At a stated term of the District Court of the United States of America for the District of Minnesota, begun and held at the City of St. Paul, within and for the District and Division aforesaid, on the first Tuesday in June, being the fifth day of June, in the year of our Lord one thousand nine hundred and seventeen, by a duly empanelled, charged and sworn Grand Jury of the United States of America within and for said District and Division, it is presented in manner and form following, that is to say:

2 UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

The Grand Jurors of the United States of America within and for said District and Division, in the name and by the authority of the said United States of America, upon their oaths present, that heretofore, to wit: on the fifth day of June, A. D. 1917, at the City of St. Paul, in the County of Ramsey, in the State and District of Minnesota, and within the jurisdiction of this Court, one Walter

Wangerin, then and there being, late of said District, did then and there wrongfully, and unlawfully wilfully fail and refuse to register, and to present himself for registration, as required by Section five of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United, States," and the Proclamation by the President of the United States under date of May 19, 1917, designating June 5, 1917, as registration day, and the regulations prescribed by the President; he, the said Walter Wangerin being then and there a male person between the ages of twenty-one and thirty years, both inclusive, and being then and there subject to registration, and not being an officer and enlisted man of the Regular Army, the Navy, the National Guard or Naval Militia while in the service of the United States; which is against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

J. M. DICKEY,
Assistant United States Attorney.

(Endorsed:) Indictment. A True Bill. P. K. Gilfillan, Foreman of the Grand Jury. Names of Witnesses examined before the Grand Jury, James H. Daley, L. C. Hodgson, T. E. Campbell, Alfred Jaques, United States Attorney. Filed June 8th, 1917. Charles L. Spencer, Clerk.

3 And thereafter, and on the 5th day of July, A. D. 1917, certain proceedings were had in said court in said cause, which were duly recorded in the words and figures following, to-wit:

United States District Court, District of Minnesota, Third Division.

Term Minutes, June Term, A. D. 1917.

July 5th, 1917.

Court opened pursuant to adjournment.

Present: Honorable Page Morris, Judge.

The United States of America, Plaintiff,

against

Walter Wangerin, Defendant.

Judgment and Sentence.

Now, on this 5th day of July, A. D. 1917, the United States Attorney for the District of Minnesota, and the defendant in the above entitled action, Walter Wangerin, in his own proper person, come into open court, and the said United States Attorney moves the Court that judgment be now rendered against and sentence pro-

nounced upon said defendant in accordance with the verdict, heretofore duly rendered by a jury and entered in said action that said defendant is guilty as charged in the indictment in said action against said defendant for the crime of having wrongfully and unlawfully, wilfully failed and refused to register and present himself for registration as required by Section 5 of the Act of Congress approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," committed at St. Paul, in the County of Ramsey, in the State and District of Minnesota, on the 5th day of June, A. D. 1917; and said defendant is asked by the Court whether he has anything to say why judgment should not now be rendered and sentence pronounced as aforesaid, but neither he nor any one for him says anything in arrest thereof; whereupon, in accordance with said verdict,

4 it is by the Court

Considered and adjudged that said defendant is guilty of the crime aforesaid and that as punishment therefor said defendant be confined in the Minnesota State Reformatory, in said State, situated at St. Cloud, Minnesota, for the term of one (1) year and until he shall have been discharged from said reformatory by due course of law.

And thereafter, and on the 9th day of August, A. D. 1917, a certain bill of exceptions was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

5 United States District Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Bill of Exceptions.

Be it remembered that on the 8th day of June, 1917, at the City of Saint Paul, State of Minnesota, the Grand Jury of the United States of America within and for said District being duly empaneled, sworn and charged to inquire within and for said District of Minnesota, in the name and by the authority of the United States of America, upon their oaths did find and present as a true bill, an indictment charging that the above named defendant, Walter Wangerin, did wilfully fail and refuse to register and to present himself for registration as required by Section five of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military establishment of the United States," and the Proclamation of the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

That thereafter, on the 11th day of June, 1917, at such place said defendant Walter Wangerin, appeared in person and by his attorney T. E. Latimer, Esq., before the Honorable Page Morris, Judge of said Court, and being duly arraigned, thereupon entered
6 his plea to the said indictment herein, through his attorney, and did say that he is not guilty in manner and form as in and by said indictment he stands charged.

That thereupon the court ordered that defendant be given until two P. M. on the 13th day of June, 1917, to withdraw the said plea.

That thereafter on said 13th day of June, 1917, defendant Walter Wangerin, and his counsel, T. E. Latimer, Esq., appeared before the bar of this court and withdrew his plea of not guilty by leave of court, and did then and there demur to said indictment upon the following grounds, to-wit:

1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the Regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the 13th Amendment to the Constitution of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section one of Article One, and Section eight of Article One, of the Constitution of the United States of America, and therefore null and void.

That thereafter, on the 22nd day of June, 1917, the argument of said demurrer was heard before the Honorable Wilbur F. Booth, Judge of said Court; Defendant appearing by Herbert L. Dunn, and T. E. Latimer, his attorneys, and plaintiff, appearing by Alfred Jacques, Esq., United States District Attorney for the District of Minnesota; and having been submitted and duly and maturely considered by the Court, the court ordered: That the said demurrer to the indictment be and hereby is overruled, to which ruling the defendant did then and there duly except, and said exception was allowed by the court.

7 That thereupon defendant did again plead not guilty to said indictment, and the court set his trial for the 2nd day of July, 1917, at 10 O'clock A. M.

Thereafter, on the 2nd Day of July, 1917, at 10 O'clock A. M. said cause was called for trial before the Honorable Page Morris, Judge of said Court, and a jury of twelve good and lawful men, and the said plaintiff appearing by its attorney Alfred Jacques, Esq., and the defendant appearing by his attorneys, T. E. Latimer, Esq., and Herbert L. Dunn, Esq., and Herman W. Phillips, Esq., the following proceedings were had, that is to say:

Plaintiff introduced its evidence, and defendant rested without presenting any, whereupon the court charged the jury, and the jury retired, and brought in a verdict of guilty as charged in the indictment.

Thereupon judgment was rendered, and defendant sentenced to

confinement for the period of one year in the County Jail of Ramsey County, Minnesota.

Thereafter on July 5th, 1917, defendant appearing in person and by his said counsel before the said trial Court, the said judgment and sentence were in all things vacated and set aside, and thereupon the court rendered judgment and sentenced defendant to confinement in the Minnesota State Reformatory at St. Cloud, Minnesota, for the period of one year.

It is hereby stipulated between the parties to this cause that the above and foregoing may be settled, allowed and signed by the Judge of this Court, and filed as the Bill of Exceptions in this cause.

Dated this 8 day of August, 1917.

ALFRED JAQUES,
U. S. Attorney,
Attorney for Plaintiff.
T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

8 Pursuant to the foregoing stipulation, tendering the above as the Bill of Exceptions reserved by defendant upon the trial of this cause, I hereby allow the same this 9th day of August, A. D. 1917.

PAGE MORRIS.
Judge of the United States District Court,
District of Minnesota.

(Endorsed:) Bill of Exceptions. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain assignment of error and prayer for reversal was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

9 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Assignment of Error and Prayer for Reversal.

The defendant in this action in connection with his petition for a Writ of Error, makes and files the following assignment of error, which he avers occurred upon the trial of the cause, to-wit:

1.

The court erred in overruling the demurrer of the defendant to the indictment,

Wherefore, the defendant for the error aforesaid prays that the judgment herein may be reversed, vacated and held for naught and that said defendant may be restored in all things to that which he has lost thereby.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Assignment of Error and Prayer for Reversal. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain petition for writ of error was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

19 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Petition for Writ of Error.

And now comes Walter Wangerin, defendant herein, and says that on or about the fifth day of July, A. D. 1917, this Court entered judgment and sentence herein against this defendant, in which judgment, sentence and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Petition for Writ of Error. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain order allowing writ of error and fixing bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

11 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Order Allowing Writ of Error and Fixing Bond.

This 9th day of August, A. D. 1917, came the defendant by his attorney, and filed herein, and presented to the Court his petition, and assignments of error intended to be urged by him, praying for the allowance of a Writ of Error and that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law in the sum of one thousand dollars ($1000.00), which shall operate as an appearance bond.

PAGE MORRIS,
Judge of District Court of the United States,
for the District of Minnesota.

(Endorsed:) Order allowing Writ of Error and fixing Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain appearance bond was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

12 *Appearance Bond.*

Know all men by these presents:

That we, Walter H. Wangerin, as principal, and Herman H. Hellhake, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars ($1000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 8th day of August in the year of our Lord, 1917.

Whereas, lately at the June Term, A. D. 1917, of the District Court of the United States, for the District of Minnesota, in a suit pending in said Court between the United States of America, plaintiff, and Walter Wangerin, defendant, a judgment and sentence ren-

dered against the said defendant, Walter H. Wangerin, and the said Walter H. Wangerin has obtained a writ of Error from the Supreme Court of the United States, to reverse the judgment and sentence in the aforesaid cause, and a Citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation, which citation has been duly served. Now the condition of the above obligation is such that if the said Walter H. Wangerin, shall appear either in person or by attorney in the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said court and prosecute his said writ of error and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for
13 the District of Minnesota, Third Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then the above obligation shall be void, otherwise to remain in full force, virtue and effect.

WALTER H. WANGERIN.
HERMAN H. HELLHAKE.

Signed, Sealed and Delivered in the Presence of

G. H. HELLHAKE.
FRED MILLER.

STATE OF MINNESOTA,
County of Ramsey, ss:

Be it known, that on this 8th day of August, A. D. 1917, came before me personally Walter H. Wangerin and Herman H. Hellhake to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission expires January 31, 1918.

STATE OF MINNESOTA,
County of Ramsey, ss:

Herman H. Hellhake and —— ——, upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the

amount of two thousand dollars, above his debts and liabilities, and exclusive of his property which is exempt from execution.

H. H. HELLHAKE.

Subscribed and sworn to before me this 8th day of August, A. D. 1917.

[NOTARIAL SEAL.] FRED MILLER,
Notary Public, Ramsey County, Minn.

My Commission Expires January 31, 1918.

The foregoing bond is hereby approved this 9th day of August, 1917.

PAGE MORRIS,
Judge of the District Court of the United States,
District of Minnesota.

14 (Endorsed:) Appearance Bond. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a certain citation, theretofore issued, was filed in the office of the Clerk of said Court in said cause which said citation here next follows:

15 District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Citation.

United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court, for the District of Minnesota, wherein Walter Wangerin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 9th day of August, A. D. 1917.

PAGE MORRIS,
Judge of the District Court of the United States
for the District of Minnesota.

Due service of the foregoing citation upon me at St. Paul, Minnesota, on the 9th day of August, 1917, is hereby admitted.

ALFRED JAQUES,
United States Attorney and
Attorney for Plaintiff.

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk, U. S. District Court, District of Minnesota.

16 And thereafter, and on the same day, a certain præcipe for transcript of record was filed in the office of the Clerk of said Court in said cause in the words and figures following, to-wit:

17 The District Court of the United States, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

Præcipe for Transcript of Record.

To the Clerk:

You are requested to make and forward a transcript of record to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in the above entitled cause and to include in such transcript of record the following and no other copies of papers, to-wit:

1. Indictment.
2. Judgment and sentence.
3. Bill of Exceptions.
4. Assignments of Error.
5. Petition for Writ of Error.
6. Order allowing Writ of Error and Fixing Bond.
7. Appearance Bond on Writ of Error.
8. This Præcipe for transcript of record.

T. E. LATIMER &
HERBERT L. DUNN,
Attorneys for Defendant.

(Endorsed:) Præcipe for Transcript of Record. Filed August 9th, 1917. Charles L. Spencer, Clerk.

And thereafter, and on the same day, a writ of error from the Supreme Court of the United States was filed in the office of the Clerk of said Court in said cause, which said writ of error and certificate of obedience thereto here next follows:

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Minnesota, Third Division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the June Term, 1917, thereof, between The United States of America, Plaintiff and Walter Wangerin, Defendant, manifest error hath happened, to the great damage of the said Walter Wangerin as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the capitol in the City of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 8th day of September, 1917, to the end that the record and proceedings aforesaid, being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 9th day of August, A. D. 1917.

Issued at office in St. Paul, Minnesota, with the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

Allowed by

PAGE MORRIS, *Judge.*

Filed August 9th, 1917.

CHARLES L. SPENCER,
Clerk, U. S. District Court, District of Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the District of Minnesota, Third Division.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States of America for the District of Minnesota.

19 United States District Court, District of Minnesota, Third Division.

No. 321.

THE UNITED STATES, Plaintiff,

vs.

WALTER WANGERIN, Defendant.

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 17 pages, numbered consecutively from 1 to 17, inclusive, is a true and complete transcript of all the records, process, pleadings, orders, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court, and in accordance with a praecipe for such transcript, a copy whereof is included within said transcript; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original Citation, together with the admission of service thereof.

In witness whereof, I have hereunto set my hand as the Clerk aforesaid, and affixed the seal of said Court, at St. Paul, in the District of Minnesota, this 11th day of August, A. D. 1917.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER, *Clerk*.

20 [Endorsed:] United States District Court, District of Minnesota, Third Division. No. 321. The United States vs. Walter Wangerin. Transcript of Record on Writ of Error.

Endorsed on cover: File No. 26,133. Minnesota D. C. U. S. Term No. 666. Walter Wangerin, plaintiff in error, vs. The United States of America. Filed September 7th, 1917. File No. 26,133.

FILE COPY.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1914

JOSEPH P. ASPER, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.

HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATCHER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

NO. 663

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

JOSEPH F. ARVER, Plaintiff in Error
VS.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

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No. 363

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH F. ARVER, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

Hodges vs. U. S. 203 U. S. 1

Baily vs Alabama 219 U. S. 219

Butler vs. Perry 240 U. S. 328

U. S. vs. Sanges 48 Fed. 78

State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Henniek 129 U. S. 141
Field vs. Clark 143 U. S. 649, 692
U. S. vs. Blasingame 146 Fed. 654
U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178
Cooley, Constitutional Limitations Chap 5 P 137
Cooley, General Constitutional Principles of Law P 87
6 Opinions Atty. Gen. of U. S. 10
10 Opinions Atty. Gen. of U. S. 413
Bryce, American Commonwealth P 165
Wilson, Constitutional Government P 57, 58, 59
Webster's Works
The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126
McCulloch vs. Maryland 4 Wheaton 405
Dred Scott vs. Sanford 19 Howard 401
Worcester vs. Georgia 6 Peters 570
Kohl vs. U. S. 91 U. S. 372
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Martin et al vs. the Lessee of Waddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594

Boyd vs. U. S. 116 U. S. 635

Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154

Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England: that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces"

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of....., for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

"all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first drafted army, and preparations are being made for the call of the second drafted army, as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the Presiden of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude, Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says,

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 43th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

> "Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas. the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the caurt's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government, as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is coreet that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidiary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficieney of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has becenie well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions; Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple. . . . For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

E. E. Latimer

Herbert L. Dunn

Frank Healy

Attorneys for Plaintiff in Error.

NO. [illegible]

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

ALFRED F. CRABB, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATHROP,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error.

NO. 394

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1917

ALFRED F. GRAHL, Plaintiff in Error
VS.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge

T. E. LATIMER,
HERBERT L. DUNN,
FRANK HEALY,
Attorneys for Plaintiff in Error

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No. 384

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED F. GRAHL, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

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The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

10 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

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Martin et al vs. the Lessee of Vaddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies, the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of..... for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of..... and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

"all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army. as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the President of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude, Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says,

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

> "Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."

Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies: .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions; Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple. . . . For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

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NO. 665

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917

OTTO WANGERIN, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
HONORABLE PAGE MORRIS,
Presiding Judge.

T. E. LATIMER,
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FRANK HEALY,
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No. 665

IN THE SUPREME COURT OF THE UNITED STATES

OTTO WANGERIN, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429
Martin vs. Hunter 1 Wheaton 304
3 Annals of 13th Congress 807
Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36
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Ex Parte Wilson 114 U. S. 3
Plessy vs. Fergurson 163 U. S. 537
Robertson vs. Baldwin 165 U. S. 276
Clyatt vs. U. S. 197 U. S. 207
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U. S. vs. Sanges 48 Fed. 78
State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

10 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

U. S. vs. Harris 106 U. S. 629

Martin et al vs. the Lessee of Waddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted there were two kinds of military service recognized

in the English speaking world—the militia and the **standing army**.

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

enrolling men in the drafted army on the ground that the Act was null and void and in violation of the provisions of the Constitution of the United States. The Court granted a preliminary injunction by a vote of three to two holding the Act unconstitutional. Later a new judge having been elected and qualified, this position of the Court was reversed and the Constitutionality of the Act upheld. Elaborate opinions were rendered by individual judges and some of the conclusions appear pertinent at the present time. Chief Justice Lowrie urged that if Congress had the right to raise an Army by conscription that this would subject all social, civil and military organizations of the States to the Federal power of raising armies and that nothing would be left that had any constitutional right to stand before the will of the Federal Government. Kneedler vs. Lane Supra pp. 246.

Another fact that was emphasized is that in all cases of forced contribution to the National Government allowed by the Constitution, such as duties, imposts, excises and direct taxes there was fixed the rule of uniformity, equality or proportion. That nowhere in the Federal Constitution is there any reference to forced contribution to the Army or any rules for such contribution as is provided in all other such cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a careful study of the Constitution itself shows that there is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have sgined an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of....., for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en

listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

> cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

> "all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

out the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army. as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the Presiden of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916. Feb. 1st, 1916, Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision t
the case at bar involves the construction of the entir
amendment, possibly the definition of the wor
slavery, and an interpretation and construction of th
phrase involuntary servitude. We take up the las
of these first as being the more important.

The phrase involuntary servitude simply means
condition or status of compulsory service the cleares
applicable term to the service provided for in th
law.

Century Dictionary—Revised and enlarged Editio
Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol.
Page 522.

Funk & Wagnall's Standard Dictionary—Servitud
Volume 8, Page 522.

Universal Dictionary of the English Language
Volume 4, Page 4213.

In the second and third of such authoritie
Military and naval service are cited as examples
such service that existed in India and in England i
the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15
Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitche
says,

"There is nothing better settled than that e

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says,

"Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:—

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract: but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."
>
> 1 Wheaton 363

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18,1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

"It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General by mail without delay. He shall also secure a list of persons who have rendered uncompensated service and consolidate these showing the names and addresses and forward them to the office of the Provost Marshal General without delay. (Section 28.)

The duty of the Mayor or similar officer in a city of 30,000 or over as set forth by the Registration Regulations are as follows: He shall appoint a Registration Board for approximately each 30,000 population. He shall collect, receive and forward all copies of the Registration cards and reports from his city and shall conduct all the correspondence for the Board of Registration in his city with the office of the Adjutant General. (Section 10.)

He shall instruct the officers within such cities to provide for Registration Booths and see that such booths are provided. (Section 21.)

He is to receive the forms for registration, verify the number sent him, notify the Governor that he has received the same and the condition of readiness in his city. (Section 23.)

On the sixth day after the President's Proclamation he will report to the Governor by telegram concerning the state of supply of forms and the appointment of Registrars. (Section 25.)

On the day after Registration he shall telegraph a summary of the city returns to the Governor. (Section 26.)

He shall prepare a complete summarization of the Registration in his city and report the same to the Governor by mail and shall furnish the Governor with a list of persons who have rendered uncompensated

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions: Second, The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constjtutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a stauncher supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple....For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various gaises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

> "To insure efficiency, an army must be to a

certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."

31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

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SUPREME COURT
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vs.
UNITED STATES OF AMERICA, Defendant in Error.

Brief of Plaintiff in Error.

Error to the United States District Court, District of Minnesota, Third Division.
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McCulloch vs. Maryland 4 Wheaton 405
Plessy vs. Fergurson 163 U. S. 537
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429
Robertson vs. Baldwin 165 U. S. 276
Rhode Island vs. Massachusetts 12 Peters 657
Sawyer vs. Alton
State vs. West 42 Minn. 47
State vs. Wheeler
Texas vs. White 7 Wallace 700, 725
The Slaughter House Cases 16 Wallace 36
U. S. vs. Blasingame 146 Fed. 654
U. S. vs. Clark 31 Fed. 710
U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178
U. S. vs. Railroad Company 17 Wallace 322, 332
U. S. vs. Wong Kim Ark, 169 U. S. 654
U. S. vs. Sanges 48 Fed. 78
Union Pacific Ry. vs. Ruef 120 Fed. 102, 11
Worcester vs. Georgia 6 Peters 570

No. 863

IN THE SUPREME COURT OF THE UNITED STATES

WALTER WANGERIN, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error.

STATEMENT.

The Plaintiff in Error was tried and convicted at the June A. D., 1917, Term of the United States District Court for the District of Minnesota, Third Division, of violation of Section Five of the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to increase temporarily the Military Establishment of the United States," and the Proclamation by the President of the United States under date of May 19th, 1917, designating June 5th, 1917, as registration day, and the regulations prescribed by the President.

The Indictment contains one count charging the plaintiff in error did wrongfully and unlawfully, wilfully fail and refuse to register, and present himself for registration as required by said Act, Proclamation and Regulations.

A demurrer was filed to said indictment in which plaintiff in error demurred upon the following grounds, to-wit:—1. That the said indictment does not state facts sufficient to constitute an offense.

2. That the said Act of Congress and the regulations prescribed by the President thereunder, set forth in said indictment, are in conflict with the terms and provisions of the Thirteenth Amendment of the Constitutionn of the United States of America, and are therefore null and void.

3. That the said Act of Congress and the regulations prescribed thereunder, set forth in said indictment, are in conflict with the terms and provisions of Section One of Article One, and Section Eight of Article One, of the Constitution of the United States of America, and therefore null and void.

This demurrer was overruled and the plaintiff in error duly excepted thereto, whereupon the case was set for trial July 2d, 1917, at which time he was tried, the jury returned a verdict of "guilty", and the plaintiff in error was sentenced by the Court to serve one year in the Minnesota State Reformatory.

SPECIFICATIONS OF ERROR.

The District Court of the United States for the District of Minnesota erred in overruling the demurrer of defendant.

BRIEF.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are

in conflict with the terms and provisions of Section 8, Article 1, of the Constitution of the United States.

Rhode Island vs. Massachusetts 12 Peters 657

Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

Martin vs. Hunter 1 Wheaton 304

3 Annals of 13th Congress 807

Kneedler vs. Lane 45 Pa. 238

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations perscribed thereunder is in conflict with the terms and provisions of the 13th amendment of the Constitution of the United States which prohibits involuntary servitude.

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 3

Plessy vs. Fergurson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 276

Clyatt vs. U. S. 197 U. S. 207

Hodges vs. U. S. 203 U. S. 1

Baily vs Alabama 219 U. S. 219

Butler vs. Perry 240 U. S. 328

U. S. vs. Sanges 48 Fed. 78

State vs. West 42 Minn. 47

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1, and Section 8, Article 1, of the Constitution of the United States in that congress attempts to delegate legislative power to the President of the

U. S. and other United States or state officials.

Stoutenburg vs. Hennick 129 U. S. 141

Field vs. Clark 143 U. S. 649, 692

U. S. vs. Blasingame 146 Fed. 654

U. S. vs. Keokuk etc. Bridge Co. 45 Fed. 178

Cooley, Constitutional Limitations Chap 5 P 137

Cooley, General Constitutional Principles of Law P 87

6 Opinions Atty. Gen. of U. S. 10

16 Opinions Atty. Gen. of U. S. 413

Bryce, American Commonwealth P 165

Wilson, Constitutional Government P 57, 58, 59

Webster's Works

The Federalist Chap. 69 P. 515

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4, Article 4, of the Constitution of the United States, and Article 10 of Amendments to the Constitution of the United States in that Congress attempts to require state officials to do that which is prohibited to the States themselves.

Collector vs. Day 1 Wallace 124, 126

McCulloch vs. Maryland 4 Wheaton 405

Dred Scott vs. Sanford 19 Howard 401

Worcester vs. Georgia 6 Peters 570

Kohl vs. U. S. 91 U. S. 372

U. S. vs. Reese 92 U. S. 214

U. S. vs. Harris 106 U. S. 629

Martin et al vs. the Lessee of Vaddell 16 Peters 410, 416

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of Article V of Amendments to the Constitution of the United States providing that "nor shall any person be deprived of his life, liberty or property without due process of law."

In re Debs 158 U. S. 594
Boyd vs. U. S. 116 U. S. 635
Gulf Colo. & Santa Fe Ry. vs. Ellis 165 U. S. 154
Fairbanks vs. U. S. 181 U. S. 301

ARGUMENT.

The Act of Congress approved May 18, 1917, entitled "an Act to authorize the President to increase temporarily the military establishment of the United States, and the regulations prescribed thereunder are in conflict with the terms and provisions of paragraphs 12 & 14 of Section 8, Article 1 of the Constitution of the United States in that Congress is attempting to raise an army by conscription.

In arriving at a proper interpretation of various sections of the Constitution this Court has had recourse in the past to an inquiry as to the state of things existing at the time of the adoption of the Constitution, and also a search of the contemporary history of that time.

Rhode Island vs. Massachusetts 12 Peters 657
Pollock vs. Farmers Loan & Trust Co. 157 U. S. 429

At the time our Federal Constitution was adopted here were two kinds of military service recognized

in the English speaking world—the militia and the **standing army.**

In the days of the Saxon Kings the militia in England was organized by counties for defence of the realm. This organization survived the Norman conquest in similar form and for similar purpose. Stubb's Select Charters P 153, 154. But Wm. the Conqueror brought with him to England an army composed of feudal and mercenary soldiers and thus planted on English soil a new military organization known as the standing army.

There was great hostility in England toward this army which resulted in many attempts to reduce its size and cripple its strength. It was entirely disbanded during the rule of Cromwell, but again revised and enlarged, and used by the later Stuarts as well as the Tudors as a means or oppression. One of the grievances set forth in the Petition of Rights in 1628 was the oppressive use of the standing army by the King. Appendix Stubb's Select Charters.

This was later expressed in the Bill of Rights offered in Parliament in 1689. One of the accusations against the King being that of "raising and keeping a standing army within his Kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to Law. Statute of Realm pp. 142, 145.

Notwithstanding their hatred of the standing army and hostility to its command by the King the fear of invasion from the continent impressed upon them the need for such a military force. This situation was met by Parliament passing the Mutiny Act of 1689 and an act for the restriction of the grant of

revenues. Thus the discipline of the army and the grant of its supplies were made entirely dependent upon the will of Parliament. Since that time the Parliament has renewed this statute annually.—Macy —The English Constitution P 335.

Attempts were made by the Tudor Kings to raise an army by conscription and later a similar attempt by the Stuarts but without success, and until the Revolution of 1688 the British army was composed of mercenary and feudal soldiers. After the Revolution of 1688 several attempts were made in Parliament to provide for the raising of an army by conscription, but the only act applying to conscription that was passed by Parliament before the adoption of our Federal Constitution was passed in 1704, and provided among other things to

> "levy and raise all able bodied, idle and disorderly persons, who can not, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his majesty as a soldier."—The Statute 4 Ann Chapter 10.

Later acts of Parliament contained similar provisions, but all attempts to extend conscription to other persons failed.

Statute 29 George II Chapter 4 (1755) 30 George II Chapter 8 (1757) 18 George III Chapter 53 (1778) 19 George III Chapter 10 (1779).

From these facts it may be seen that only paupers and vagabonds could be conscripted into the standing army in England; that no person who could vote for members of Parliament could be conscripted, and to all intents and purposes the membership of

the British army was based upon voluntary service. This fact was emphasized during our War of the Revolution when the Whigs were opposed to the war and the English King was compelled to hire Hessians and others from the continent to make up the English forces fighting against the colonies.

That this feeling against standing armies prevailed in America at the time of the Constitutional Convention of 1787 and especially among the delegates to that Convention is shown by the provision in Section 8, Article 1 of the Constitution of the United States which provides "but no appropriation of money to that use shall be for longer time than two years". The opposition to the raising and control of an army by the president is shown by the provisions of that section which gives to Congress power" to make rules for the government and regulation of the land and naval forces".

That Congress has recognized that it was the intention of the authors of the Federal Constitution to provide for the raising of the Regular Army by volunteer enlistment is shown by one hundred and twenty-seven years of national legislation. During all that time the subject of raising an army by conscription has been discussed in Congress only twice—once in 1814 when a bill providing for the raising of an army by conscription was introduced in Congress at the request of the Secretary of War but failed of being enacted into law. Daniel Webster perhaps the greatest expounder of the Constitution, opposed this measure upon the ground that it was in contravention of the terms and provisions of the Constitution of the United States.

In opposing this measure he said,

> "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, for the general purposes of the war, under the color of a military service...
>
> That measures of this nature should be debated at all, in the councils of a free government, is a cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form....
>
> The administration asserts the right to fill the ranks of the Regular Army by compulsion. It contends that it may now take one out of every twenty-five men, and any part or whole of the rest, whenever its occasions require. Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasures of the government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.
>
> Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty?
>
> Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious

and mischievous government may require it?

In granting Congress the power to raise armies, the People have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the People themselves and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority is to hold a language which is true only in regard to despotism. The tyranny of Arbitrary Government consists as much in its means as in its ends, and it would be a ridiculous and absurd constitution which should be less cautious to grant against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction, a free government without adequate provisions for personal security is an absurdity, a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

Van Tyne, The Letters of Daniel Webster.

The question of raising an Army by conscription was again discussed by Congress in 1863 and a Conscription Act was passed by both Houses of Congress and signed by the President. 12 U. S. Statutes at Large 731.

The question of the constitutionality of this act was not determined by the Federal Courts. The only case before the courts in which the constitutionality of this act was considered and determined was in the State Court of Pennsylvania. In the case of Kneedler vs. Lane et al 45 Pa. St. 238 an injunction was sought against the officials entrusted with the duty of enrolling drafted men, to restrain them from

nrolling men in the drafted army on the ground hat the Act was null and void and in violation of he provisions of the Constitution of the United States. The Court granted a preliminary injunction y a vote of three to two holding the Act unconsti- utional. Later a new judge having been elected nd qualified, this position of the Court was reversed nd the Constitutionality of the Act upheld. Elabor- te opinions were rendered by individual judges and ome of the conclusions appear pertinent at the resent time. Chief Justice Lowrie urged that if 'ongress had the right to raise an Army by con- eription that this would subject all social, civil and ilitary organizations of the States to the Federal ower of raising armies and that nothing would be eft that had any constitutional right to stand before he will of the Federal Government. Kneedler vs. ane Supra pp. 246.

Another fact that was emphasized is that in all ases of forced contribution to the National Govern- ent allowed by the Constitution, such as duties, mposts, excises and direct taxes there was fixed he rule of uniformity, equality or proportion. That owhere in the Federal Constitution is there any eference to forced contribution to the Army or any ules for such contribution as is provided in all other uch cases. Kneedler vs. Lane Supra 242.

Judge Woodward calls attention to the fact that a areful study of the Constitution itself shows that here is no intention to authorize the raising of an Army by conscription and sets forth the 16th and 17th paragraphs of Section 8, Article 1 of the Federal Constitution in support of his contention. Kneedler

vs. Lane Supra pp. 256-257.

By the Act of Congress approved May 18, 1917, the first paragraph of Section 1, authorizes the President to raise and organize — — — such a number of increments of the regular army provided by the National Defense Act approved June 3, 1916, or such part thereof as he may deem necessary. This National Defense Act provides that

> "the army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now, or may hereafter be, authorized by the law."

Section 2 of said National Defense Act provides that the regular army shall consist of officers and enlisted men. Section 27 of such act provides that after November 1st, 1916 all enlistments in the regular army shall be for a term of seven years. Section 57 of said Act determines the composition of the Militia as follows:

> "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia."

Sections 69, 70 and 71 of said act provides for enlistment in the National Guard as follows:

> "Section 69—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three

years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Section 70:—Federal Enlistment Contract:—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligations the enlisted man shall not be recognized as a member of the National Guard until he shall have sgined an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this....day of..... 19...., as a soldier in the National Guard of the United States and of the State of..... for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of....., and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of....., and of the officers appointed over me according to law and the rules and articles of war."

"Section 71. Hereafter all men enlisting for service in the National Guard shall sign an en-

> listment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

However, Section 2 of the Act of May 18, 1917 provides:

> That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and wherever the President decides that they can not effectually be so raised or maintained, then by selective draft."

Thus, for the first time in the history of this nation Congress attempts to provide for the raising of a regular army, an organization based upon voluntary enlistment, by conscription. These drafted men are to be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions of Section 8, Article 1, of the Constitution of the United States which specifically reserves to the States the authority of training the militia and the appointment of officers.

The third paragraph of Section 1 of the Act of Congress adopted May 18, 1917 authorizes the President

> "to raise by draft as herein provided, organize and equip an additional force of 500,000 enlisted men, or such part or parts thereof, as he may deem necessary."

Section 2 of said Act provides that

> "all other forces hereby authorized except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training

> cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Section 5 of the same Act provides that

> "all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act. Provided further, that persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided."

By these provisions men between the ages of twenty-one and thirty, not otherwise exempted, among them the plaintiff in error, are to be taken from the group that Congress has designated as unorganized Militia and placed in the Regular Army, National Guard and Drafted Army at the will of the President in violation of the provisions of the Federal Constitution which refer to the militia as follows:—

> "Congress has power — — — to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions; to provide for the organizing, arming and disciplining of the militia, and for the governing of such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

By the provisions of the Act of May 18, 1917, the appointment of officers and the authority of training the militia are placed in the hands of Federal Authorities, thus taking away the rights of these members of the unorganized militia which is specifically granted them by the Constitution.

Furthermore, these men who are members of the unorganized militia are not called forth to execute the laws of the Union. Congress, the President, the War Department nor any other authority contends that this army is being called forth for this purpose. The civil authorities are well able to execute the laws of the Union. There has been no need for any portion of the National Military Forces to be called forth to suppress insurrections, either now existing or likely to exist in the future, and the emergency set forth in said Act does not refer to insurrections. Also there is no foreign foe on our soil who is to be repelled nor is there any body of foreign troops quartered in the vicinity of our soil from whom an invasion is imminent. The existing emergency referred to in the Preamble of said law and in the several sections thereof is not due to the inability of this Government to "execute the laws of the Union".

ont the Militia to the three instances enumerated in

It may be pertinent to call attention to the fact that the "existing emergency" repeatedly referred to in the Act of May 18, 1917 grows out of a declaration of Congress that a state of war exists between this country and Germany and from said emergency there has developed no failure to execute laws, no insurrections and no invasions of our soil, but already a portion of the Regular Army of the United States is in France. Members of the National Guard are on the way to Eastern Ports of embarkation, cantonments have been built for the training and housing of the first draftetd army, and preparations are being made for the call of the second drafted army, as provided in paragraph 4, Section 1, of the act of May 18,1917. Instead of being called forth to repel invasion, our military forces including the National Guard and the unorganized Militia are being ordered across the Atlantic Ocean, there to engage in warfare three thousand miles from our soil, and Congress has authorized the President to authorize the Governor to authorize the Mayor to authorize the Local Exemption Board to call forth this plaintiff in error, a member of the unorganized militia to engage in this warfare.

During the whole history of the English speaking people, no such power has been exercised by the national, Legislature or Executive except as applied to paupers and vagabonds, and the attempted usurpation of said power was one of the contributing causes of the downfall of the Stuarts.

It may be well to examine the status of the Military system of England from which was developed the Militia of the Colonies, the early States, and later of

the United States. From the earliest time the militia has existed in England as a local force for defense. Stubbs Select Charters pp. 163 and 164. By statutes of Edward III, Chapter 2, and 4 Henry IV Chapter 13 the members of militia could not be compelled to go out of their Shires; by Statute 25 Edward III Chapter 8, and 26, George III Chapter 107 the members of the militia could not be ordered out of their own country unless in case of urgent necessity certified to by Parliament, and could not be sent out of the Kingdom under any circumstances whatever. The last statute above mentioned was passed in 1786, only one year prior to the meeting of the Constitutional Convention in Philadelphia.

Mr. Dicey in the Law of the Constitution pp. 287-288 states that

> "the Militia is a Constitutional Force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which can not be required to serve abroad."

The members of the Constitutional Convention clearly recognized the English theory of a militia as a force for internal defense and definitely limited the power of Congress and the President over this military force as is shown by the provision in Section 8 of Article 1 of the Constitution, where the right of appointment of officers and the authority of training the militia is specifically reserved to the States and Congress was limited very definitely as to the conditions under which it could call for the militia. Furthermore, in Section 2, Article 2, of the Constitu-

tion the control of the President over the militia as Commander in Chief was specifically limited to the time "when called into actual service of the United States". The attitude of the people of that time is shown by the fact that after all these safeguards were thrown about the Militia in the shape of limitations on Congress and the President it was considered necessary in order to protect the interests of the people to include in one of the first ten amendments to the Constitution, known as the Bill of Rights, Article 2 of the Amendments of the Constitution of the United States as follows:—"A well regulated Militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The intention of the authors of our Constitution and the attitude of the people at the time of its adoption is emphasized by an instance occuring at the Constitutional Convention. The Committee of Detail reported the clause authorizing Congress to provide for the calling forth of the militia and among other provisions included that of to "enforce treaties". Gouverneur Morris moved to alter this clause by striking out the words "enforce treaties" and this was adopted by a vote of the Delegates. Journal of Congress pp. 454-594.

If there could be any doubt in the minds of anyone regarding the intent of the members of the Constitutional Convention as to the power which the Constitution granted to Congress and the President over the militia, this act of striking out the provision giving the power to Congress to call forth the militia to enforce treaties placed the Convention clearly on

record as limiting the power of Congress in calling the Constitution, all of which are for service at home and within the boundaries of the Nation. In an early case Mr. Justice Story in discussing the rights of Congress over the militia stated:

> "It is almost too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in the clauses; and that in all other respects and for all other purposes, the militia is subject to the control of the government of the State authorities."—Houston vs. Moore 5 Wheaton 1, 51.

In 1912 during the administration of President Taft it appeared that an emergency might arise and a greatly increased number of troops might be needed and the question of calling forth the militia to be used in foreign warfare was seriously considered, and an opinion regarding the rights of Federal authorities to call forth the militia in such an emergency was taken up with the Attorney General of the United States and he was requested by the Secretary of War to give an opinion on the subject. In accordance with this request Attorney General Wickersham gave an elaborate opinion and among other things said:

> Sir: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:
>
> "Whether or not, under existing laws, the President has authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"
>
> It is certain that it is only upon one or more

of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion".

Then, too, "if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling invasion."

"What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsory executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

"So that when an armed force is used to compel the observance of treaty obligations or to punish or obtain compensation for their violation there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or its Territories. In the history of this

provision of the Constitution there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government was intended as a distinct limitation upon their employment.

"The militia of the States, restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties or to protect the rights of the government or its citizens in those cases in which protection must be sought beyond the territorial limits of the country."

"I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative."

This opinion was accepted by the President who was himself a jurist of ability and a careful student of the Constitution. This opinion of the Attorney General is binding upon the Executive Department of the Government and it has been recognized as correct by the present Executive administration. President Wilson in an address delivered in New York

City on January 27, 1916 said,

> "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our National defense should be built up and encouraged to the utmost; but you know, gentlemen, that under the Constitution of the United States the National Guard is under the direction of more than two score States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of actual invasion has the President of the United States the right to ask those men to leave their respective States."

He later made similar addresses at Cleveland, Ohio on January 29, 1916, at Milwaukee, Wisconsin on January 31, 1916 and at Topeka, Kansas on February 2, 1916.

New York Times Jan. 30th, 1916, Feb. 1st, 1916. Feb. 3rd, 1916.

The Act of May 18th is a violation of the 13th Amendment of our Constitution reading as follows:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

The 13th amendment has been construed by this court in nine cases that are pertinent here as follows:—

The Slaughter-House cases 16 Wallace 36

Civil Rights cases 109 U. S. 3

Ex Parte Wilson 114 U. S. 417

Plessy vs. Ferguson 163 U. S. 537

Robertson vs. Baldwin 165 U. S. 275
Clyatt vs. U. S. 197 U. S. 207
Hodges vs. U. S. 203 U. S. 1
Bailey vs Alabama 219 U. S. 219
Butler vs. Perry 240 U. S. 328

The application of this Constitutional provision to the case at bar involves the construction of the entire amendment, possibly the definition of the word slavery, and an interpretation and construction of the phrase involuntary servitude. We take up the last of these first as being the more important.

The phrase involuntary servitude simply means a condition or status of compulsory service the clearest applicable term to the service provided for in the law.

Century Dictionary—Revised and enlarged Edition Volume 8, Page 5519.

Oxford New English Dictionary—Servitude Vol. 8, Page 522.

Funk & Wagnall's Standard Dictionary—Servitude Volume 8, Page 522.

Universal Dictionary of the English Language—Volume 4, Page 4213.

In the second and third of such authorities, Military and naval service are cited as examples of such service that existed in India and in England in the very early days.

Bouvier's Law Dictionary, Vol. 2, Servitude, 15th Edition.

Black's Law Dictionary, 2nd Ed. Page 656.

In State vs. West, 42 Minn. 47, Mr. Justice Mitchell says:

"There is nothing better settled than that en-

forced labor is involuntary servitude within the meaning of such constitutional provisions.

This court has defined it as a condition of compulsory service in the Clyatt case supra page 215 and the Bailey case supra page 243.

The Robertson case supra in effect admits that military and naval service are within the letter of the inhibition of the 13th amendment.

The amendment prescribes that the condition of compulsory service shall not EXIST in this land, and is clearly self-executing, and by the use of the word EXIST it places its inhibition on every individual, and on the National Government as well as the states.

As an inhibition on the national government Robertson vs. Baldwin supra in a case involving the constitutionality of a natonal law condemned for permitting involuntary servitude classes the amendment with the Bill of rights as a limitation on the power of the Federal Government. Harlan, Judge in the dissenting opinion thereto pages 292-3 so classes it, citing the opinion of Mr. Justice Miller in the Civil Rights cases supra at page 20, paragraphs two and three. See also dissenting opinion to that case at page 35, paragraph 2. To the same effect see numerous and clear expressions of the court in the Plessy, Clyatt and Bailey cases supra.

Also U. S. vs. Sanges 48 Fed. 78

Black on Constitutional Law, 2nd Ed. Page 461

McClain on Constitutional Law says.

"Amendment XIII prohibiting slavery or involuntary servitude is applicable not only to the Federal Government, but also to state governments and to individuals as well."

We gather from the foregoing and urge here that thereby the inhibition condemns the practice of slavery, and involuntary servitude, whether the dominant one be either an individual, or the state or National governments, and as well condemns laws by such sovereignties permitting it or compelling it.

In support of this theory we wish to quote the late Justice Moody who as Attorney General ruled, Opinions A. G. Volume 25, Page 474, that the ordinance of the Panama Canal Commission amounting to an executive act of that department compelling laborers contracting with the commission for a term of service to complete their term would be involuntary servitude within the amendment. In short the executive department of the government cannot hold a person in at least that capacity in a condition of involuntary servitude.

Mr. Justice Moody says to the Secretary of War:

> "I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you inform me that the executive committee of the Panama Commission desires me to formulate a series of rules and regulations the observance of which would enable that committee, in making contracts for the furnishing of labor, to avoid a condition of peonage under the authority of the United States. The word slavery as used in it is descriptive of the chattel slavery which once existed in this country. That any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention. But the words involuntary servitude are much broader than slavery, and include within their meaning many forms of service which cannot properly be described as slavery."

On page 477 he says,

> "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude within the meaning of the Constitution."

On Page 481 he says,

> "I entertain no doubt that the condition described in this ordinance is that of involuntary servitude and not the less involuntary servitude because the contract of service in which the laborer submits to the conditions prescribed by the ordinance was entered into freely and voluntarily and under careful public supervision."

Further on page 482 he says,

> "In the employment of labor on the canal the utmost care should be taken to exclude the conditions which have been indicated as those of involuntary servitude or any other conditions of like effect and tendency. This care should be exercised not only in making the contracts to which the UNITED STATES IS A PARTY, but in scrutinizing the contracts, usages and practices between those who agree to furnish contract labor to the United States and the laborers themselves."

Thus we see that there is substantial authority to the effect that forms of slavery and involuntary servitude practiced by the National Government as a master and laws by it permitting or compelling the condition are unconstitutional. We think too, that the national feeling which forced the 13th amendment clearly shows this through the passage and repeal of various laws such as the various compulsory road laws, and the repeal of the seaman law in controversy in the Robertson case and others to like effect. In practically the only case going into the subject of the compulsory road laws cited in the Butler case supra,

and upon which is based that of Dasler vs. Kansas, the law was vehemently attacked as a minor, subtle entering wedge for the return of forms of slavery to the state, and the court said in passing on it, that we could deal with the more flagrant forms when we came to them. The road laws were accepted as means of organization only, because the service would have been cheerfully rendered without it, as it is in all states of the Union today.

A return to compulsory military service would be a distinct return to the principles of feudalism, and particularly and clearly to that form known as vassalage, denounced by Mr. Justice Field in his dissenting opinion in the Slaughter-House cases supra at Page 69, as within the amendment and in the same class with peonage, serfage, villeinage and etc. Vassalage is herein otherwise treated, but we think we ought to recall the court's attention here to the fact that the essence of it was compulsory military service to the King or Lord, in return for protection and tenure of land.

We find in Henry Wilson's Rise and Fall of the Slave Power in America, Volume 2, Page 60, that the southern states themselves sold slaves on the block at auction. And under such circumstances we have no doubt that the states themselves, through escheat or otherwise, held slaves as did the governments of ancient Greece and Rome. Does anybody doubt that the 13th Amendment inhibited such practices, and such practice by the National Government, as Justice Moody says.

The government may regulate the right to quit to such limited extent as does not en-

croach on the spirit of the prohibition protecting the laborer and soldier's liberty which will under ordinary conditions prevent a disorganization of the system. If the state could compel its citizens to labor on the canal, it could compel them to build another Appian way, and the Pyramids. It is true that under most any situation, such action by a government elected by the people is unthinkable, but no one can gainsay the fact that peculiar unsettled conditions among the electorate may produce a despotic government, in which case for at least two years, the Constitution is our only protection.

In Missouri the courts decided in In Re Thompson 117 Mo. 83 that a law authorizing Justice of the Peace to empower the sheriff to hire out vagrants for a period of six months for cash was held involuntary servitude within the 13th amendment. This well illustrates how our country's Constitution has developed and improved on the English Constitution as it was when ours was adopted as to involuntary public service, when compared to the compulsory service of vagrants only in the English army and navy of that time, herein otherwise noted. As otherwise shown compulsory military service generally, was unconstitutional in England at that time and for many years prior thereto.

Every evidence from the language of the amendment itself, and from a history of the character of the times, leads to the conclusion that it is to be contsrued in its broadest sense.

Mr. Justice Field in Slaughter-House cases supra page 90, says:

"Still it is evident that the language of the

> amendment is not used in any restrictive sense. It is universal in its application."

The use of the disjunctives "neither" and "nor" disassociate "slavery" and "involuntary servitude" and render them independent of each other.

The amendment in itself, says Mr. Justice Brown in Robertson vs. Baldwin supra, makes no distinction between public and private service. Would it not follow ordinarily that there was none intended?

The amendment itself makes one exception, that of compulsory service for crime. The inference is to be drawn that there were no others, and that if any were intended they would have been stated. Clearly above any others, no public servitude was intended to be excepted, as service for crime being a public servitude, in which the state is the dominant and the criminal the servient factor, is expressly excepted from its operation, leaving the inference that no others of that class were intended to be excepted. In plain words the only act of sovereignty in which compulsory service is permitted is service for crime.

2 Story on Constitutional Law, Section 1924 says:

> "The 13th amendment forbids not merely the slavery known to our laws, but all kinds of involuntary servitude not imposed in punishment of a public offense.

If the government's theory and contention is correct that all public service, or any compulsory service that the public wishes to impose, or has in the past imposed, is a general exception to the language of the amendment, then the only expressed exception is of no value whatever, and is to be treated as surplusage, and might as well have been eradicated

therefrom by the framers. This court in the past has not been given to such a construction. Under the exception in the language, the state may hold a man to compulsory service for crime.

The amendment in lieu of many other possible words and phrases to express a prohibition uses the drastic phrase and word "shall not exist", clearly making the provision self-executing, denouncing a condition or status, by whomsoever created or maintained, be it individual, corporation, state or Nation.

This court as jealously guards the many and inalienable rights of the people, as it has recently jealously upheld the plenary powers of the government.

The high pitch of the public nerves at the time the amendment was adopted, by reason of the war, the draft act and the riots incident thereto, and many like and subsidary incidents, attest the mood of the public, and its desire and intent for sweeping changes in policy. The fact that the draft act directly preceded the 13th amendment, that it was clearly in the minds of the public, that it engendered terrific opposition, that such an act had theretofore been considered unconstitutional, and the fact that a constitutional amendment prohibiting involuntary servitude, would cover every form of compulsory service, including service to the public, and the legislature in voting on such an amendment would so construe it and believe they were covering this class of service as well as any other, is added reason to give effect to their votes. Today if we were to prohibit by another amendment just such service, we could use no better language considering the broad general language in such instruments than

to repeat the language of the 13th amendment as it now is.

It seems to us that conscription was so clearly in the mind of the public and all bodies proposing or voting on the instrument, that had they intended to make an exception of compulsory military service, they would have done so in the amendment. Instead they make but one exception, involuntary servitude being permitted to the government in cases of conviction for crime. If the English language has even an approximately definite meaning we must say that the framers of the 13th amendment by making one definite exception meant to exclude all other forms of slavery or involuntary servitude.

A number of forms of service which are apparently comparable to military service and are public services or otherwise sanctioned by usage, and have survived for such reasons, has been called to our attention by the cases, and we herewith list them in somewhat the order of their strength with military service, for the purpose of commenting on same. Military service—service on roads—jury service—service as a witness—service in posse of sheriff—service of sailor—service of apprentice to master—service of child and ward to parent and guardian—power of legislature to punish abandonment of labor in extreme cases—compulsory education—service in the pest-house. The involuntary servitude of a sailor that was held constitutional in the Robertson case, has been abolished by Sections 8304-13 U. S. Compiled Statutes. Neither is compulsory service of an apprentice to a master tolerated here now. Both of these however were non-public ser-

vices but they show how the so-called exceptional cases are going. The Compulsory Road Laws as Justice McReynolds in the Butler case says were at one time in effect in thirty-eight states of the Union but are now in effect in seven states, possibly only five and these all southern states that have not progressed as fast as the balance of the states. Official Good Roads Book United States—Published by American Highway Association at Page 67—Local Revenues and Labor Taxes and the statutes of the states herein cited. One thing is true of this service, as that of Jury, witness and posse service, that the service generally would have been cheerfully rendered without the law. The compulsory feature was simply a more efficient means of perfecting an organization to which few objected later. Jury service and compulsory process for witnesses however, are by express provision provided for in the Constitution. Service of child and ward to parent and guardian, compulsory education and service in the pest-house are not compulsary service in any sense but a mere regulation of liberty not amounting to a deprivation and on the same plane as the well-known limitations on the right of free speech and carrying weapons that do not amount to deprivations of the rights.

There is some dicta in the Robertson and Butler cases supra to the effect that the doctrine that compulsory military service was unconstitutional and incompatible with a free government was a novel doctrine at the time the 13th amendment was adopted, and that it was an exceptional service sanctioned by immemorial usage and needed no expressed exception in the amendment to be excepted from its operation

We need but to refer here to the history of military service as it relates to our laws and institutions and those upon which they are based and herein otherwise set forth and fully discussed to establish the fact that voluntary service was the only one tolerated, and that conscription or compulsory service was the novelty and unconstitutional. It was opposed and every possible guard placed against it at all times.

Under our articles of Confederation Congress had no power to raises armies but had to ask the states for quotas. Our Constitution itself was drawn and intended to perpetuate here all the liberties held by the citizens of England, and to perpetuate and establish more and greater liberties than existed in the mother country and prevent tyranny by the state.

Then followed the 13th amendment, which was in the words of this Court, a charter of universal freedom. Can it possibly be said that the unconstitutionality of Compulsory Military Service is a novel doctrine and that this sweeping provision establishing a principle rather than inhibiting particular cases does not cover it.

One ground for Judge Brown's decision in the Robertson case has been directly overruled by this court in Bailey vs. Alabama supra—That is that a service voluntary at the start by contract is in law voluntary during the period of the contract notwithstanding it is in fact involuntary at any time during the period.

The other ground for the decision, the one in point here, was very much mutilated by the dissenting opinion of Justice Harlan. His opinion was quoted approvingly by District Judge McPherson in Union Pacific Railway vs. Ruef 120 Federal 102-111.

Judge Brown did not have an exceptional public service to deal with, as did Judge McReynolds, it was simply an exceptional private service.. The seaman's law in question has been long abolished by congress in strict conformity to what we think was the spirit coming from the 13th amendment and the times of its adoption, and we are sure the dangers that Judge Brown feared from such a rule as set out in his opinion have undoubtedly not been realized. Judge Harlan says in that opinion that public service is in no legal sense involuntary servitude. But that cannot lie considering the broad definition of the term laid down in the Clyatt and Bailey cases.

Judge Brown also classes the 13th amendment with the Bill of Rights and cites what he calls exceptions: A careful perusal thereof seems to us will show that such exception so-called would be mere regulations not amounting in any sense to a deprivation of the right.

In five cases cited in State vs. Wheeler, the 13th amendment was not raised and the same was true of Sawyer vs. Alton. That in Dennis vs. Simon the amendment was raised but not discussed, and the Canadian case could have no bearing anyway under our Constitution. Only Dassler vs. Kansas supports it, and the law and a decision on it were bitterly attacked as an entering wedge in a case of apparently no moment to be used as a basis for a decision in a case of tremendous moment which would amount to slavery to the state.

But in all of the above mentioned cases, which are apparently comparable to compulsory military service there is one elemental difference between them

and compulsory service. The servitor loses none of his rights as a citizen of the state wherein he resides or of the United States. He still has the right of suffrage, the right to be represented by an attorney, the protection of the civil laws, and in cases of transgression, the right to be tried by a jury under the provisions of the civil laws and to receive such punishment as provided by the civil laws. Furthermore the terms of service is temporary and definitely fixed by the laws and customs permitting the same.

In the case of military service, the servitor becomes a mere tool in the hands of his superiors. Except, where given that right by statue, which has been done in a very few states, he has lost the right of suffrage, he has lost the protection of the civil laws. He is bound by autocratic rules and regulations promulgated by the President, Congress, the War Department, and a host of immediate superiors and which are enforced according to the whim of the commanding officer. When he transgresses he is tried by court martial. He can have no attorney to present his facts and defend him, no jury to pass upon the evidence, and the kind and amount of punishment lies in the justice and mercy of his military judges. The Constitutional guarantee of the right of suffrage and the right of jury trial, the protection and duties of the civil laws afford him no relief. His paramount duty is to obey, blindly and implicitly the military commands and regulations, his only privileges are those granted by the superior military authorities and his only protection is the justice and mercy of his military judges.

True his term of service is at present fixed by sta-

tute, but with compulsory military service enforced, and the right of suffrage limited to a majority of those directly or indirectly benefited by compulsory military service and a great standing army, what guarantee is there that the term of such service will not be extended indefinitely or made a life service? What guarantee is there that we will not build up in this country a military caste and a military system that would make the German system appear an inefficient weakling?

Voluntary military service is based on a contract; but some of the cases seem to indicate that after the contract has been consummated it becomes more than a contract, that it becomes a status which binds the servitor in the service until the contract expires or is terminated by the consent of the parties.

Even if this be true we must admit that the status is based and must be based on a contract voluntarily entered into by the parties. If a status, involving the liberty, the very life and limb of the servitor can be created by law based on compulsion and force, then the whole structure work of republicanism crashes to the ground, and the liberties of the individual, hewn by centuries from the bodies of countless martyrs become a mirage. Conscription presupposes no voluntary contract of service, therefore no status has and can be created, the services rendered become an involuntary servitude such as is forbidden by the 13th Amendment. The English speaking people have always feared and abhored compulsory military service as a careful reading of their statutes, parliamentary debates and legal discussions will show. The draft act of the 60's was never passed upon by the

federal courts. Although passed in the midst of a great civil war, the conscript army so raised to be used in quelling an insurrection that meant the destruction of the very nation itself, the Act provoked riots and opposition from one end of the country to the other, altho the act was not rigidly enforced and permitted the drafted man to hire a substitute for a reasonable amount. The people still smarted from the sting of its lash, still bitterly resented a curtailment of their liberties and then their representatives, acting upon public demand, passed and made a part of the great national constitution the famous 13th Amendment, and in that Amendment its framers, with the Draft Act and its riots and opposition still fresh in their minds, pronounced, NEITHER slavery NOR involuntary servitude, except as a punishment for crime.... shall exist. Knowing the military history of their country and their mother country, knowing that a vast number of the population considered the draft Act unconstitutional, they used a few brief nouns having a definite meaning, the conjunctives 'neither, nor' and the transitive verb 'shall', and in that single terse command "neither slavery nor involuntary servitude.... shall exist," they inserted the one single exception, "except as a punishment for crime whereof the party shall have been duly convicted."

III

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 4 of the Constitution of the United States and Article 10 of the

Amendments to the Constitution of the United States, in that Congress attempts to require the State officials to do that which is prohibited to the States themselves. Chief Justice Marshall in an early case has well stated the relation existing between the State and Federal Governments and in discussing this subject he said,

> "The powers exclusively given the Federal Government are limitations upon the State authorities but, with the exception of these limitations, the States are supreme and their sovereignty can be no more invaded by the action of the State Government than the action of the State Government can arrest or obstruct the course of National Power."
>
> Worcester vs. Georgia 6 Peters 570

The right of the Federal Government to interfere with the sovereignty of the State was raised in the case of Collector vs. Day. Congress having passed an Act providing for the raising of revenue by an income tax, one of the United States Collectors collected from Judge Day, a State Official, a tax on his salary which was paid under protest and an action brought to recover it. Mr. Justice Nelson in commenting on the Act said

> "The Federal Government and the States, although both existing within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limit of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States" and therefore it was held that the Federal Government could not tax the income of the State Officials since it would interfere with the

efficiency of the State Government. 11 Wallace 113, 124.

The Dual form of government existing in this country and the supremacy of each government within its own sphere, precluding the right of interference on the part of the other government within that sphere, has become well settled after a thorough discussion of this relationship in our courts by some of our greatest jurists.

United States against Railroad Company, 17 Wallace 322, 332.

McCulloch vs. Maryland 4 Wheaton 316—405.

Dred Scott vs. Sanford 19 Howard 401.

Kohl vs. United States 91 United States 367—372.

The courts have recognized that when the States had established their independence of Great Britain the powers which had existed in the King and Parliament were taken over by the people of the States and that later certain grants of this power was given to the Federal Government; but only to the extent of these grants are the States and the people limited in their powers. In the case of Martin et al vs. The Lessee of Vaddell the court said,

> "When the Revolution took place the people of each State became themselves sovereign." "When the people of New Jersey took possession of the reins of the government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or Parliament, became immediately rightfully vested in the State."

16 Peters 410, 416.

The fact that one government is supreme in a given field does not permit it to use that as an excuse to

so exercise its powers as to interfere with the workings of the other as a separate government. In fact as far as the Federal Government is concerned the Constitution of the United States has made it a duty of Congress to guarantee to every State of the Union a republican form of government and this injunction of the Constitution applies to the acts of the Federal Government as well as to those of any foreign country.

In Martin vs. Hunter's Lessee the court said,

> "I am firmly pursuaded that the American people can no longer enjoy the blessings of a free government whenever the States Sovereignty shall be prostrated at the feet of the Federal Government."

1 Wheaton 363.

In the case of Texas vs. White the court again emphasized this proposition and said,

> "Not only therefore, can there be no laws of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In the light of these decisions and the provisions of the Act of May 18.1917 above quoted, it is difficult to realize that Congress would attempt to place on the Statute Books of this nation a law containing the provisions set forth in Section 6 of said Act which reads as follows:

> "All the officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or ap-

> pointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct.....Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty:..... shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by courtmartial and suffer such punishment as a court-martial may direct."

In accordance with the provisions of said Act of May 18,1917, the President prescribed certain registration regulations, and Section 5 of said regulations after quoting in full Section 6 of said Act reads as follows:

> "It will be found by an examination of these regulations which contain the President's directions to officers of the Nation, State, counties, and municipalities, and to other persons designated to perform duties in connection with the registration, that the President has directed specific duties to be performed by certain of such officers and that he has authorized the Governors of States and officers of counties and municipalities to employ certain persons as agencies in the execution of this act. Since the act prescribes the penalty of imprisonment (with no alternative of fine) for the failure or neglect of such officers and agencies to perform duties so prescribed by the President, every person charged with duties should carefully study the instructions in general, and in particular so much thereof as pertains to his own peculiar duties."

These regulations prescribe that the Governor of the State shall appoint the Registration Board in all Counties or similar divisions outside of cities of 30,000 population or over, that he shall notify such Boards of the date for Registration and of all their duties and direct the Sheriff in said Counties to appoint Registrars in each voting precinct. (Section 19.)

He shall direct the Mayor or similar official to appoint the Board of Registration in the case of cities of 30,000 or over. He shall see that all such appointments have been made. He shall notify the Wardens of Penitentiaries and other penal institutions that they shall register their inmates. (Section 20.)

He shall see that the proper Registration Booths are provided throughout the State. (Section 21.)

He shall distribute forms for registration to the penal institutions and to the Sheriffs and Mayors within the State where there is a deficiency in the supply of forms. (Section 23.)

He is required to speed up the work of registration. (Section 24.)

On the sixth day after the President's Proclamation he is required to report to the Provost Marshal General regarding the condition of the supply of forms and as to whether the organization is in readiness in his State. (Section 25.)

He is to receive the summaries of the county and city returns on the day after registration and shall consolidate these returns and telegraph the same to the Provost Marshal General. (Section 26.)

He shall later receive a complete summarization of the registration in the various counties and cities of the State and consolidate these and forward them to

the office of the Provost Marshal General without delay. He shall also secure a list o who have rendered uncompensated service solidate these showing the names and addr forward them to the office of the Provost General without delay. (Section 28.)

The duty of the Mayor or similar officer of 30,000 or over as set forth by the Re Regulations are as follows: He shall appoi istration Board for approximately each 30,(lation. He shall collect, receive and forward of the Registration cards and reports from and shall conduct all the correspondence for t of Registration in his city with the office o jutant General. (Section 10.)

He shall instruct the officers within such provide for Registration Booths and see booths are provided. (Section 21.)

He is to receive the forms for registrati the number sent him, notify the Governor th received the same and the condition of rea his city. (Section 23.)

On the sixth day after the President's tion he will report to the Governor by tele cerning the state of supply of forms and the ment of Registrars. (Section 25.)

On the day after Registration he shall te summary of the city returns to the Governo tion 26.)

He shall prepare a complete summarizati Registration in his city and report the sa Governor by mail and shall furnish the Gove a list of persons who have rendered uncon

service. (Section 28.)

He must furnish Registration Cards to the City Clerk and receive the Registration Cards from the sick and those temporarily absent and turn them over to the proper Registrars. (Section 35.)

The duties imposed upon Sheriffs of the various counties of each State by the Registration Regulations are similar to those imposed upon the Mayor.

Prosecuting Attorneys and City Attorneys are required to act as the legal advisors of the Registration Boards and Registrars and aid and advise in all matters touching Registration. (Section 15.)

City and County Clerks are required to furnish cards to the sick and non-resident persons, to certify to said cards and must familiarize themselves with the duties of the Registrars and instructions in order to answer all questions. (Section 32.)

After setting forth the above required duties on the part of the State, County and City Officials the Registration Regulations in Section 29 declares that:

> The foregoing are only the immediate duties of the governors and mayors of cities of 30,000 population or over in connection with the registration. For the further purposes of supervising the draft, the office and duties of the State organization are of ever-increasing importance, and it is the intention to decentralize the execution of the law and place its execution in each State in the hands of the governor and others named to perform certain duties.

Thus instead of Congress raising an army in accordance with the provisions of the National Constitution it has passed an act which requires the States through their Officials to raise armies under the supervision of the President and the War Department.

By the Constitution and laws of the various States, Governors, Sheriffs, Mayors, County and City Clerks and other County and State Officials are elected and have certain duties to perform. By this act of Congress and the regulations prescribed thereunder these State, County, and City Officials are required to take up the new duties imposed upon them by the Federal Government and if any one of them fail or refuse to perform these duties, he is liable to arrest by the United States Marshal to be tried in the Federal Courts and upon conviction to be sentenced to serve not more than one year. Their State duties are to give way to the orders of the National Executive and in all of these acts they are doing that which is forbidden to the State of which they are an official, to wit:—the raising of an Army.

In Collector vs. Day, supra, the Supreme Court of the United States held that the Federal Government could not tax the salaries of the State or County officials as that would interfere with the rights of the State to maintain its sovereignty. How much less may the State maintain its sovereignty if its officials are required to give of their time and services in carrying out the mandates of the Federal Government and upon their failure to do so shall be taken from their offices and incarcerated.

If any power outside of the State Government or its citizens can control the acts of the State officials, whether that power be a foreign prince or potentate, a United States Congress or President, then that State loses its republican form of government. If a State government is to continue its existence within the Nation, its officials must be free to exercise their

duties as laid down by the State Constitution and the laws enacted thereunder, unless in violation of the National Constitution, without interference from other sources claiming the power to control and dominate them as State Officials.

IV.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of Section 1, Article 1 and Section 8, Article 1, of the Constitution of the United States in that Congress attempts to delegate legislative power to the President of the United States and other United States and State Officials, to raise an Army.

Section 1, Article 1 of the Constitution of the United States provides,

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8, Article 1 provides,

> "The Congress is to have the power: ..... to raise and support armies; .....to make rules for the government and regulation of the land and naval forces."

Section 2, Article II provides,

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States."

The authority of the President over the army was discussed by some of the authors of the Federal Constitution after the Constitutional Convention adjourned, in one of a series of papers published to influence the States to adopt the Constitution, which

papers were later published in a volume known as "The Federalist." This particular paper was prepared by Alexander Hamilton and in it he compared the authority of the President over the Army and Militia with that of the King of England and the Governor of New York. Among other things he said,

> "The most material points of difference are these: First, the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain, and the Governor of New York have at all times the entire command of all the militia within their respective jurisdictions: Second. The President is to be Commander-in-chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war, and the raising and regulating of fleets and armies."—The Federalist, Chapter LXIX pp 343.

Another eminent authority on the Constitution of the United States has said that

> "a settled maxim in Constitutional law is that the power conferred upon the Legislature to make the laws can not be delegated by that department to any other body or authority."—Cooley General Principles of Constitutional Law, pp87.

In the case of Field vs. Clark 143 U. S. 649,692 the court stated,

> "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government organized by the Constitution."

In applying these principles the Federal Courts have held that Congress cannot authorize the Secretary of the Interior to make provisions or protection against destruction by fire and depredation upon the public forest reservations and provide for the punishment for violation of said law or regulations of the Secretary.

U. S. vs. Blasingame 116 Fed. 654.

Also that Congress cannot delegate to the Secretary of War the power to determine whether a bridge lawfully constructed is an obstruction and must be removed.

U. S. vs. Keokuk etc. Bridge Company 45 Fed. 178.

The authority of the President over the army and navy has been made a subject of ruling by the Attorney General of the United States from time to time and in those opinions the fact has been emphasized that the President has no Legislative powers except as he may veto legislation. Further that the Constitution has carefully distinguished the two powers of the executive, or administrative, and the legislative, one from the other and has held various regulations made by the President to be void under the Constitution.

6 Opinions Attorney General 10 (1853)
10 Opinions Attorney General 413 (1862)

In all civilized countries of the world there has been an age-long struggle between the Executive and the Legislature for supremacy. For centuries the history of the English people has been simply a story of the struggle between the King and Parliament for domination of the English Government, with the

authority of Parliament gradually gaining ascendency. This is simply one of the reflexes of the struggle of the people against Absolutism and each victory gained for Parliament has been one more step in the progress towards Democracy. This feeling against immense power being placed in the hands of the Executive was reflected in our National Constitution, which provides for a President with limited powers and having the same amount of authority continuing so long as that instrument remains unchanged.

There are, however, many in this country who look upon the relative powers of the various departments of government as something to be determined by the amount of influence a given department may exert over the others rather than by the Constitution, and especially is this true of the Executive. One authority states that "the presidency has been one thing at one time, another at another, varying with the man who occupied the office." "The office was one thing from 1789 to 1825 when English precedents and traditions were strongest, and another thing during Jackson's time when he worked his own will with or without sanction of law and still another thing from 1836 to 1861 when the Presidents lacked personal force to dominate the other branches of government, and yet another when Lincoln "seemed for a little while to become the whole government."

Woodrow Wilson—Constitutional Government pp 57, 58.

This same authority in discussing the authority of the President said,

"The makers of the Constitution seem to have thought of the President as what the sterner Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of the law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it."

Ibid pp 59, 60.

While we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of Constitutional principle."

Ibid pp 59.

The fact that there is a danger, under practically any form of Constitutional government of a man of blood and iron or of great military genius overthrowing the authority of the legislature and taking over to himself most of the prerogatives of the government, is admitted by Bryce, the greatest English authority on the American Constitution, when he says that Julius Ceaser was more than a match for the Senate, Cromwell for the Long Parliament, Louis Napoleon for the French Assembly of 1851, and when the President happens to be a strong man, resolute, prudent and popular, he may well hope to prevail against a body which he may divide by a dexterous use of patronage or otherwise.

American Commonwealth pp 165.

During the short period of our National existence

there have been many intense struggles fought out upon the floor of Congress to maintain the integrity of our National Constitution. It has been assailed from many sources and for many purposes, but during this whole time it has never had a staunchcr supporter or a more able exponent than Daniel Webster, who, although in the minority at times, consistently opposed what he considered unconstitutional usurpation of power by the President and equally unconstitutional acts of Congress in granting the President powers that appeared to be legislative. In discussing the Fortification Bill of 1835 which provided for the appropriation of $3,000,000 for military and naval services to be expended under the DIRECTION of the President he said,

> "The honorable member from Ohio, near me, has said, that if the enemy had been on our shores he would not have agreed to this vote, and I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the Capitol, I would not agree to it. The people of this country have an interest, a property, an inheritance in this instrument, against the value of which forty capitols do not weigh the twentieth part of one poor scruple....For my part, I am content to show France that we are prepared to maintain our just rights against her by the exertion of our power when need be, according to the form of our own constitution; that, if we make war, we will make it constitutionally; and that we will trust all our interests, both in peace and war, to what the intelligence and the strength of the country may do for them, without breaking down or endangering the fabric of our free institutions."
>
> Works of Daniel Webster Volume IV, pp 226, 228.

While it is true that the courts have recognized

the right of Congress to authorize the working out of details by the Executive Department, it has only been where these details were considered to be administrative acts rather than legislative. However, in this Act of May 18, 1917, we find that its purpose is "to AUTHORIZE the President to increase temporarily the military establishment of the United States." No where in the Act is there any provision for raising a single additional unit or a member of any portion of the army. The preamble states "that in view of the existing emergency, which demands the raising of troops in addition to those now available," and then proceeds to fail to provide for the raising of a single additional man, unless the President so desires. By this act Congress declares that the situation is such that additional troops should be raised and then proceeds to authorize the President to say whether any troops shall be raised and, if so, whether they shall be raised by additions to the Regular Army, the calling out of the National Guard, the conscripting of men from the unorganized militia, or by voluntary enlistment. Such an act the plaintiff in error contends to be clearly the delegation of legislative powers to the President.

V.

The Act of Congress approved May 18, 1917 and the regulations prescribed thereunder are in conflict with the terms and provisions of the fifth Amendment of the Constitution in that it subjects citizens of the United States to deprivations of life or liberty without due process of law, since it assumes to confer upon the President of the United States discretion-

ary and arbitrary powers in the selection of citizens into the draft army. This Court has repeatedly commented upon the acts of Congress which tend to take away the rights of the people under various guises. This attitude was well stated by the court in the case of Boyd vs. U. S. when he said that

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal construction deprives them of half of their efficiency, and leads to gradual depreciation of the rights as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."
>
> 116 U. S. 635.

These words of the learned judge have been quoted approvingly in several cases since that time.

In Re Debs 158 U. S. 594.

Gulf, Colorado & Santa Fe Ry. vs. Ellis 165 U. S. 154.

Fairbanks vs. U. S. 181 U. S. 301.

Brown vs. Walker 161 U. S. 617-635.

U. S. vs. Wong Kim Ark. 169 U. S. 654.

There can be but little dispute but that a person who becomes a member of the army loses his liberty or at least a large portion of it, but an army organized upon any other theory would have but a small degree of efficiency. This fact is well stated by Mr. Justice Brown in the case of U. S. vs. Clark when he says,

"To insure efficiency, an army must be to a

> certain extent, a despotism. Each officer, from the General to the Corporal, is invested with an arbitrary power over those beneath him and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence."
>
> 31 Fed. 710.

When a man enlists in the regular army or the National Guard, he agrees to accept this new status so that there is no infringement upon his liberty. Under the provisions of this Act of May 18, 1917 this plaintiff in error is to be taken and forced into the National Army on the decision of a person or persons appointed by the Governor of Minnesota and the Mayor of the City of St. Paul; forced to leave his business, to lose the right to support his family, lose his character as a citizen, his franchise, his civil right of a jury trial, the right to a trial in the civil courts, and his rights to the protection of the laws of the land. Can the deprivation of liberty mean more than this, and yet, under the National Constitution, the State or its officials have no right to raise an army.

It is evident from a careful reading of the Act approved May 18, 1917 that Congress recognized the fact that it was doubtful whether under ordinary circumstances and conditions of the nation it had the authority to pass such an act. This is shown by the preamble which gives the reason for the passage of the act in which it says "that in view of the exist-

ing emergency," and there is also a repeated reference to the 'existing emergency' throughout the various sections of the act. But the fact remains that an "existing emergency," either real or fancied, is no reason for the passage of a law which in itself is unconstitutional. This theory has been set aside for all time under the decision of this Court in the case of Ex Parte Milligan, a case growing out of the conditions of the time when this country was facing the most serious 'emergency' that has developed durin our history, and in that case this Court said.

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."
> 4 Wall 2, 142.

An "emergency" may be the basis and excuse for the passage of a law by Congress, but never the basis or reason for a decision or opinion of this court. Exercise of a power enjoyed by Congress is permitted as is of course, but 'emergency' as a reason for its constitutionality, is utterly unsound. Congress or the Executive through one cause or another may not be able or willing to find and use constitutional means to cope with a supposed existing emergency, but that does not signify it is not there, it only signifies they have been unable to find one, or are unwilling to use one that is known. The people are the ultimate authority is such a case, and if an emergency in fact exists, which cannot be reached under the Constitu-

tion, it can be met under the power of the Amendment as provided by Article 5 of the Amendments to the Constitution. In the past we have met great domestic crises and upheavals, and foreign dangers from which the people, through Congressional action, apparently for the time being, were unable to find immediate Constitutional means of relief; however, when the courts have refused to sanction the unconstitutional means proposed, Congress has been able to meet the situation, when necessary, with means that were Constitutional. For over one hundred years we have found the Constitution ample to meet every emergency and today the present emergency can be met without any encroachment upon either letter or spirit of that instrument—our fundamental law, but the Act approved May 18, 1917 violates both.

In conclusion this Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations prescribed thereunder are null and void in that Congress has no power under the National Constitution to raise an army by conscription. This fact is emphasized by the fact of the hostile attitude of the people of England and the American Colonies, during the 18th century, toward a standing army; and by the further fact of limiting the authority of Congress over the most important military force of that time—the militia.

This Act being an attempt by the federal government to raise an army by conscription, is in violation of both the letter and spirit of the Constitution, in that it is an attempt to force the members of the militia into the national army by means other than that prescribed by that instrument. The rights of the

members of the militia to be officered and trained by the States, as granted them by the Constitution, are denied and overridden by the provisions of this Act. Furthermore, since none of the conditions under which Congress can call forth of the militia exist, the militia, both organized and unorganized, could not be called forth either by Congress or the President, even though the act provided for the proper method of doing so.

However, if Congress had the authority to raise an army by conscription, this right was lost by the adoption of the XIII Amendment to the Constitution which prohibits involuntary servitude except as a punishment for crime.

If by any possible interpretation of the Constitution, Congress has authority to raise an army by conscription, it is clear that that authority can not be delegated to the President or any other administrative officer of the United States or of the States, yet the Act in question, makes no provision for raising an army, but authorizes the President, in his discretion, to provide for raising whatever forces he desires and in the manner in which he wishes. We urge that such a delegation of power comes within the inhibition of the Constitution.

Furthermore, by the provisions of this Act, various state officials are required to engage in the raising of an army under the direction of the President, and for failure or refusal to obey the dictates of the President are liable to arrest and imprisonment. This plaintiff in error is drafted by state officials into the national army while the Constitution prohibits the raising of such an army by the States. Also this

compulsion upon officials of the States destroys the sovereignty of the States in that sphere where they are supreme and breaks down the integrity of republican principles in their government.

By this Act this plaintiff in error is to be deprived of his liberty and possibly of his life without due process of law, and, upon the whim of a state official or an appointee of a state official, ordered into the conscript army, but without the rights reserved to him, as a member of the militia, under the Constitution and the laws of the land.

For these reasons Plaintiff in Error urges that the Act of Congress approved May 18th, 1917 and the regulations of the President prescribed thereunder be declared null and void.

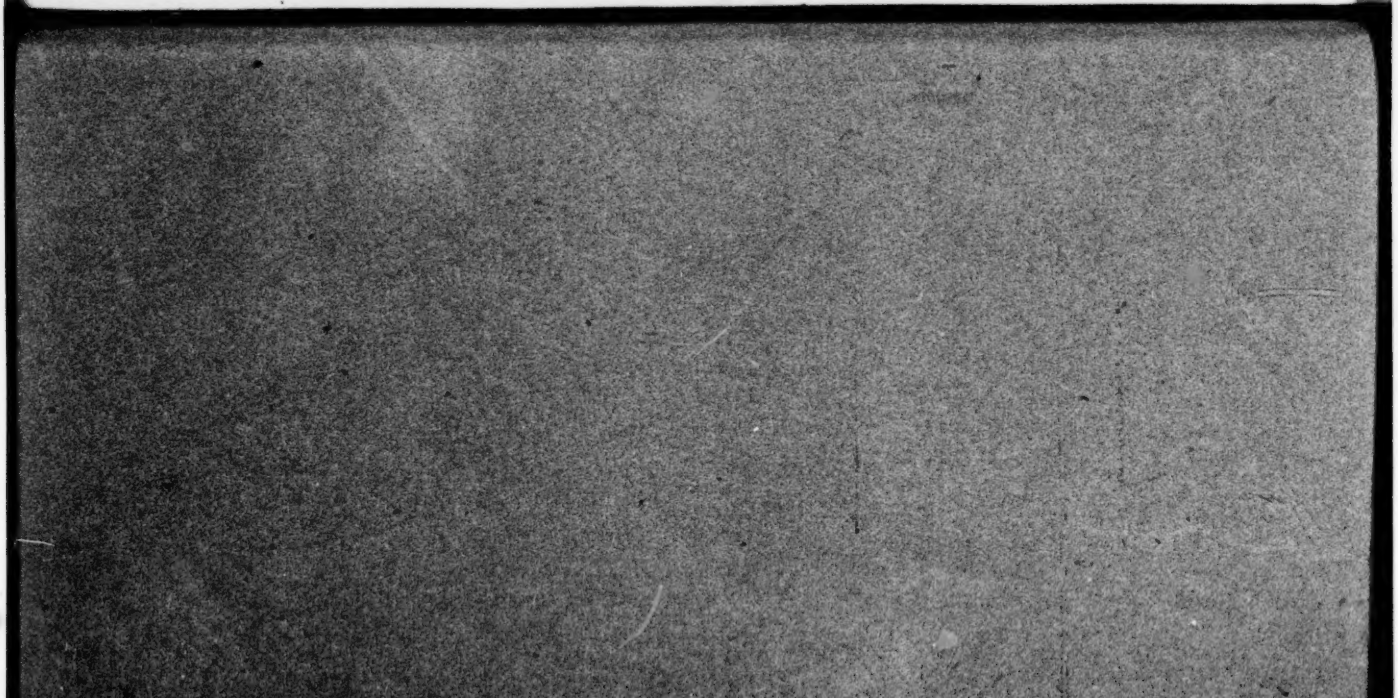
J. E. Latimer

Herbert L. Dunn

Frank Healy

Attorneys for Plaintiff in Error.

[redacted]



Supreme Court of the United States

OCTOBER TERM, 1917.

No. .

LOUIS KRAMER AND MORRIS BECKER, PLAINTIFFS-IN-ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Writ of Error and Order Allowing Same.

UNITED STATES OF AMERICA, ss.:

The President of the United States, To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Louis Kramer and Morris Becker, defendants, a manifest error hath happened to the great damage of the said defendants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

(Seal)

Allowed by

LOUIS D. BRANDEIS,
Associate Justice of the
Supreme Court of the United States.

Indictment.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City and County of New York, within and for the District aforesaid, on the first Tuesday of May in the year of our Lord one thousand nine hundred and seventeen, and continued by adjournment to and including the fourth day of June in the year of our Lord one thousand nine hundred and seventeen.

SOUTHERN DISTRICT OF NEW YORK, ss.:

The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present that on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, the President of the United States of America duly issued his Proclamation as provided by the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," in which said Proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several States and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7

A. M. and 7 P. M. on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular army, the navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Louis Kramer, Morris Becker, Joseph Walker and Louis Sternberg (hereinafter referred to as the defendants), all late of the City and County of New York, in the District aforesaid, heretofore, to wit, on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, and on each and every day thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire together and agree among themselves, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, that is to say: The said defendants unlawfully, wilfully, knowingly and feloniously did conspire together and agree among themselves, and with the said divers persons whose names are to the Grand Jurors unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed

by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated ages other than officers and enlisted men of the Regular Army, the Navy and the National Guard and Naval Militia, while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," unlawfully and wilfully to fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress approved May 18, 1917;

And to effect the object of the said conspiracy, the defendant Louis Kramer, on the thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did give to a person whose name is to the Grand Jurors unknown a leaflet entitled "No Conscription!" and ending with the paragraph:

> "We consider this campaign of the utmost importance at the present time. Amid hateful cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.
>
> NO-CONSCRIPTION LEAGUE,
> 20 East 125th St., New York."

and did request the said person whose name is to the Grand Jurors unknown, wilfully to fail and refuse to present himself for registration and to submit thereto, as provided by the Act of Congress approved May 18, 1917;

And further to effect the object of the said conspiracy, the said defendant Louis Kramer, on the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did give to one James J. Finan a leaflet entitled "No Conscription" and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest against Conscription!"; and did request the said James J. Finan wilfully to fail and refuse to present himself for registration and to submit thereto, as provided by the Act of Congress approved May 18, 1917;

And further to effect the object of the said conspiracy, the defendant Morris Becker, on the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did give to several persons whose names are to the Grand Jurors unknown, a leaflet entitled "No-Conscription," and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest against Conscription!";

And further to effect the object of the said conspiracy, the defendant Morris Becker, on the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did have in his possession and under his control a collection of pamphlets entitled "No Conscription," and ending with the paragraph:

> "We consider this campaign of the utmost importance at the present time. Amid hateful cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

No-Conscription League,
20 East 125th St., New York."

and a collection of other pamphlets entitled "No-Conscription," and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest Against Conscription!";

And further to effect the object of the said conspiracy, the defendant Joseph Walker, on the the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did give to divers persons whose names are to the Grand Jurors unknown, a number of pamphlets entitled "No Conscription," and ending with the paragraph:

> "We consider this campaign of the utmost importance at the present time. Amid hateful cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.
>
> No-Conscription League,
> 20 East 125th St., New York."

and a number of other pamphlets entitled "No-Conscription," and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest Against Conscription!";

And further to effect the object of the said conspiracy, the defendant Joseph Walker, on the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did have in his possession and under his control a collection of pamphlets entitled "No-Conscription," and ending with the paragraph:

> "We consider this campaign of the utmost importance at the present time. Amid hate-

ful cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York."

and a collection of other pamphlets entitled "No-Conscription," and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest Against Conscription!";

And further to effect the object of the said conspiracy, the defendant Louis Sternberg, on the said thirty-first day of May in the year of our Lord one thousand nine hundred and seventeen, at the Madison Square Garden, in the City and County of New York, in the Southern District of New York, did have in his possession and under his control a collection of pamphlets entitled "No Conscription," and ending with the paragraph:

"We consider this campaign of the utmost importance at the present time. Amid hateful cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York."

and a collection of other pamphlets entitled "No-Conscription," and ending with the words "Mothers, Fathers, Sons—Turn Out in Protest Against Conscription!";

Against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (§§37 and 332 U. S. C. C., and §5 of the Act of May 18, 1917.)

FRANCIS G. CAFFEY,
U. S. Attorney.

(Endorsed) U. S. District Court, The United States of America vs. Louis Kramer, Morris Becker, Joseph Walker and Louis Sternberg. Indictment conspiring to induce persons not to register. Sections 37 and 332 U. S. C. C. and Section 5 of the Act of May 18, 1917. Francis G. Caffey, U. S. Attorney. A true bill. Frank B. Taylor, Foreman, filed June 4, 1917.

June 4, 1917, deft. Louis Kramer pleads not guilty. Bail $10000. Deft. Morris Becker pleads not guilty. Bail $10000. Deft. Joseph Walker pleads not guilty. Bail $7500. Deft. Louis Sternberg pleads not guilty. Bail $7500. Mayer, *D. J.* June 4, filed demurrer. June 6, demurrer overruled. Mayer, *D. J.* June 11, trial begun (defendants plead not guilty). June 12, trial concluded. Court directs a verdict of not guilty as to deft. Louis Sternberg. Verdict Louis Kramer and Morris Becker, Guilty, Joseph Walker, not guilty. Deft. Joseph Walker and L. Sternberg discharged. June 13th, defendant Louis Kramer sentenced to Two years U. S. Penitentiary, Atlanta, Ga., and to pay a fine of $10000. Defendant Morris Becker sentenced to one year and eight months U. S. Penitentiary, Atlanta, Ga., Mayer, *D. J.*

Defendant's Bill of Exceptions.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

LOUIS KRAMER, MORRIS BECKER, JOSEPH WALKER and LOUIS STERNBERG,
Defendants.

This cause came on for trial at the June, 1917, Term, before the Honorable Julius M. Mayer, Judge, and a jury, the United States (hereinafter called Government) being represented by Messrs. Francis G. Caffey, United States Attorney, and Harold A. Content, Assistant United States Attorney, and the defendants represented by Harry Weinberger, Esq., and thereupon the following proceedings were had and testimony given:

A jury was duly impaneled and sworn.

Mr. Weinberger: If your Honor please, I wanted to put on the record the various grounds for quashing the indictment on the grounds of the unconstitutionality of the law.

The Court: Yes.

Mr. Weinberger: First, on the ground that it violates Section 13 of the Amendments to the Constitution against involuntary servitude, in that servitude covers both service in the army and navy, and therefore involuntary servitude protection clause covers that particular thing.

That it violates Article I of the Amendments, Section 8—or rather Article I of the Amendments in reference to the combination of church and state, inasmuch as it gives to certain people—certain religious sects, privileges and exemptions that it does not give to all the other citizens, and therefore re-establishes a combination of church and state.

You see, under that same section it infringes the religious belief of the people of the United States by stating to them practically that the only way that they can get the protection of the law is by joining a particular church, and in that way putting forth a promise or a reward, to join that church.

It violates Section 8, Subdivisions 15 and 16 of that first section—Section 15 provides for the calling forth of the militia to execute the laws of the Union, and to suppress insurrection and repel invasion. We have at the present time no call for militia to execute the laws of the United States; nor have we any insurrection; nor are we invaded.

Furthermore, the Constitution provides, in Section 16, for organizing, arming and disciplining the militia, and for governing; the last part of that is important, coupled with an Act of Congress reserving to the States respectively the appointment of the officers and the authority of the training of the militia according to the discipline prescribed by Congress;

That the Conscription Law calls, therefore, for men of the State into the service of the United States, but it does not call on the Governor to provide militia.

My next point is that it violated Section 8, Article 12, in that the only power Congress has is: to raise and support armies. To raise and support armies and no appropriation of money to that use shall be for a longer term than two years; so that each two years the people shall have the right to vote whether to continue the Congress that raises a particular number of soldiers.

That at the present time Congress has appropriated money for a period of thirty years and therefore the entire support of the army being unconstitutional in that the money for the purposes of this Conscription Law is to get men who will be supported by the money paid in over a period of thirty years, therefore the entire Act is unconstitutional; the purpose of the Act being that each two years the people shall practically exercise the right of control, that standing armies shall not be supported for any term of more than two years until the people have a right to vote thereupon.

It violates Section 14, Subdivision 1, in reference to religion. It also violates Section 8—I have not the particular section here.

The Court: A mere reference to the section will be enough.

Mr. Weinberger: It violates that section in the Constitution which guarantees each defendant,—or rather guarantees to all the people throughout the United States the full protection of the law.

The Draft Law is applicable only to people between the ages of 21 and 30, and under that individuals may be drafted not only for military service, but also for agricultural or industrial service, and therefore makes a distinction of class; and furthermore, there is nothing in the Conscription Law which is limited to any period, and therefore under the present Conscription Law, the men between 21 and 30 years may be put into any service whether military, agricultural or industrial, for the rest of their lives and practically that means slavery.

Even in the Civil War, the draft, which was not passed upon by any court, was limited to two years.

Mr. Content: The Act is entitled, "To increase temporarily the military establishment."

Mr. Weinberger: There is nothing in the Act itself; that is the title; but the words are very clear that it means for a period of all time.

And also that it violates the section of the Constitution which guarantees to the citizens equal rights.

This law gives special rights on the grounds of particular religious belief, and also gives special rights to men over the age of thirty inclusive, and under the age of twenty-one, and therefore makes class distinction, which is also in violation of law.

On all these grounds I move for a dismissal of the indictment.

The Court: Motion denied.

Mr. Weinberger: I respectfully except.

Mr. Content opened the case to the jury on behalf of the Government.

The Court: We will now take an adjournment until ten minutes past two.

Mr. Weinberger: I ask that the jury be kept together and that they be asked also not to read the newspapers or editorials in the daily papers on the trial.

The Court: Gentlemen, I don't propose to ask you to keep together. You have taken your oaths and you may do any proper and legal thing between now and the time that you return, that you may desire. I expect you, of course, to keep an open mind, and am confident that you will, and simply pass on this case as the evidence justifies; and I have sufficient confidence in you to let my instructions stop there.

Mr. Weinberger: I respectfully except, and I ask the Court to ask the jury then not to read editorials or comments on this trial as the case proceeds, so that they will not get outside argument, or any argument outside of the argument that counsel may make here before them.

The Court: It will probably conduce to your comfort, not to read any papers, if such there should be, which have comments on this case, but I do not

propose to prevent you from reading any news articles. You are not to be influenced by anything that you do read, if you read any.

Mr. Weinberger: I respectfully except to both denials.

The Court: We will take a recess until ten minutes after two o'clock.

(RECESS UNTIL 2:10 P. M.)

AFTERNOON SESSION.

(2:10 P. M.)

JAMES J. FINAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a member of the New York City police force? A. I am, sir.

Q. What is your rank? A. Detective-sergeant, first grade.

Q. Of what Branch Detective Bureau? A. Fourth Branch Detective Bureau.

Q. How long have you been a police officer? A. Ten years past.

Q. Mr. Finan, on the 31st day of May, 1917, did you attend a meeting in the Madison Square Garden? A. I did.

Q. And about what time of the day or night was it that you arrived at Madison Square Garden? A. I arrived at the Garden at about six-thirty p. m.

Q. Now I ask you to look at the four defendants, at this table, and state whether or not you saw any of those defendants on the 31st day of May, 1917, in the Madison Square Garden, in New York City? A. I did, sir; I saw the four there.

Q. You saw what? A. I saw the four defendants there.

Q. Will you tell me about what time it was that your notice was first attracted to any of them? A. It was around 10:30 p. m.

Q. And to which one of the four defendants was your notice first attracted? A. To the defendant Kramer and the defendant Becker.

Q. Will you stand up, Kramer and Becker. (Two of the defendants stand up). Are those the two defendants you have reference to? A. Yes.

Q. As being the ones to whom your attention was first called?

The Court: Which is which?

The Witness: This is Kramer on this side with the glasses, and this is Becker standing up back of the counsel (indicating).

Q. Will you tell us in your own words, just what you observed at the time your notice was first attracted to the two defendants, those whom you have identified as defendants Kramer and Becker? A. Why, it was that they had a large bundle of circulars on their arm, or in their hand. Kramer had the wide one and defendant Becker had the small, or narrow one. When I first saw them, they were talking together.

Q. Who were talking together? A. Kramer and Becker. In a minute or two,—there were three or four of them—about three men I should judge came over and spoke to them; there was three or four, possibly five more men, and they then would take a bundle, small bundle like this (indicating), like this larger bundle, and they would hand it to the men, that is the bundle, and they would hand them——

Q. To the men and women? A. Men and women, and then they would ask Kramer or talk to Kramer and he would point with his hand to go around to the right or the left of the Garden, whichever way they wanted. Finally I saw him point downstairs

to one man and hand a bundle to that man, and he left him and went downstairs.

Q. Could you hear any of the conversation between Kramer and Becker, and these other people? A. No, I could not, I was not near enough to them.

Q. So what your testimony relates to is the gesticulating with the hands? A. Yes, just as they handed a bundle of pamphlets to them they motioned.

Q. Were they both together then? A. Both, Kramer had the larger ones and Becker the smaller ones.

Q. In point of size, you mean? A. Yes, sir.

Q. Tell us what happened after that? Will you look at the other two defendants, Walker and Sternberg, and state whether or not you saw them? A. I did, sir.

Q. And what were they doing? A. They were two of the men that they did—that Kramer and Becker had handed bundles to with directions to go out throughout the building, to different parts of the Garden, and deliver them.

Q. So that at the time that you saw this group of people around Kramer and Becker, you saw the others, that is, Walker and Sternberg, and some other five or six persons whose names you don't know, in there at the same time? A. Yes, sir.

Q. What part of the building was that in? A. In the second balcony.

Q. Second balcony? A. Yes, second from the top.

Q. Next to the top? A. Yes, sir.

Q. On what side of the house is that? A. The Madison Avenue side—Fourth Avenue, I should say.

Q. About what time was this, Mr. Finan? A. It was around ten-fifteen, between ten and ten-thirty, I don't know the exact time, I didn't take notice of that.

Q. It was about ten? A. After ten, before I first arrived.

Q. After these various people whom you described, received their bundles of leaflets, with di-

rections with the hand where to go, will you tell us what happened? A. Why, Kramer started to give them out to citizens sitting there, and as he did I walked over and stood alongside of him. He turned around and handed me one.

Q. Before he handed you one, did you see him give any others out? A. Yes, he did give out five or six.

Q. Then you say he handed you one? A. Yes, sir.

Q. I show you a pamphlet, and ask you whether you have already identified that before the United States Commissioner (handing paper to witness)? A. I have.

Q. Have you your initials on the back of it? A. Yes, sir, on the corner.

Q. Will you state what that is? A. Why, this is a "No Conscription" pamphlet.

Q. I don't mean that; where did you get it from? A. I got this from Louis Kramer.

Q. Louis Kramer? A. Yes.

Mr. Content: I offer it in evidence.

Mr. Weinberger: No objection.

(Received in evidence as Government's Exhibit No. 1, and read to the jury.)

Q. Now, Mr. Finan, at the time you say that the defendant Kramer handed you Government's Exhibit No. 1, will you state whether you had any conversation with him? A. I did, sir.

Q. What was that conversation? A. When the defendant Kramer handed me that pamphlet I asked him what it was. He informed me it was some good advice for me. He then asked me if I was going to enroll and register next Tuesday, and I said I was. He said, "If you will take our advice, you will stay away from the polls, or the registration places." He said, "If everybody stays away there is not soldiers or police enough to make us go, but if some people go we will all have to go. If you stay away we will be right back of you" or words to that effect.

Q. You were dressed in ordinary citizen's clothes, not in uniform then? A. Yes, sir.

Q. Is that the substance of the conversation between Kramer and yourself? A. Yes, sir.

Q. After that conversation what happened? A. Why, he left me, and then handed them out to other people, and he handed out one or two more when Sergeant Silverman of the 8th Coast Artillery, I believe, he is attached to, he came up and placed his hand on his shoulder and started to take him towards the stairway and Sergeant Silverman had another man with him.

Q. You mean another guardsman in uniform? A. Yes, and I walked over in back of them and as they got there Kramer started to struggle and make a fight. He still had these pamphlets in his hand, he turned to Silverman and said, "I have a lot of friends in the Garden, and if you don't turn me loose, we will start something and make a lot of trouble," or words to that effect, and then I stepped up——

Mr. Weinberger: May I put on the record, of course, at this time, that all this was subject to exclusion on the ground that it applies to only one of the defendants proper, as to the conspiracy of the four; but subject to the four being connected with that conversation or any statements between Kramer and this witness, it should not be taken as against them.

The Court: So far as it affects the other defendants, this is taken subject to being connected.

Mr. Content: I think, if your Honor please, there is some connection already in the case, I think they were shown to be agreeing together.

The Court: Yes.

Mr. Weinberger: I except of course—just as the Court pleases, if it is shown that the

four were giving out pamphlets, any conversation between Kramer and this witness with reference to registering had nothing to do—the mere fact that he was there giving out pamphlets, assuming that they were there for that purpose, the mere fact that Kramer in addition told these men not to register, there is no proof of any conspiracy to tell them not to register.

The Court: We can only take the testimony step by step.

Mr. Weinberger: I merely wanted it on the record, so I can move later to strike it out.

The Court: Very well.

The Witness (continuing): I then stepped up to Sergeant Silverman——

Q. This was after Kramer, after you heard Kramer threaten to make trouble? A. To call his friends and make trouble. I then stepped up to Sergeant Silverman and told him I was—showed him my shield and told him——

Q. Was Kramer there when you told that to Silverman? A. Yes, sir.

Q. Go on then and state what you said. A. I told him I was a policeman from Headquarters and I requested the custody of the prisoner. I said I would take him downstairs as quietly as possible, so he would have no trouble started in the Garden.

Q. Did he turn Kramer over to you? A. He did. I then showed Kramer my shield and I said "Give me the pamphlets you got," or words to that effect, and he refused to give them to me and I then took them away from him.

Q. I show you a bundle of pamphlets and ask you if those are the pamphlets you took from Kramer (handing bundle to witness)? A. Yes, sir, they are.

Q. And you put his name on the back? A. On the back, "Louis Kramer."

Q. And these are the same, this is the same bundle that was offered in evidence before the United States Commissioner on the preliminary hearing? A. Yes, sir.

Q. At the same time I show you Government's Exhibit 2 before the United States Commissioner and ask you whether these were taken from the Kramer bundle (handing same to witness)? A. At the same time.

Q. That is, this is one of them? A. This is one of them.

Mr. Content: Now, if the Court please, I offer in evidence Government's Exhibit No. 2 before the Commissioner, as Government's Exhibit No. 2 on this trial; and I offer in evidence the balance of the bundle as Government's Exhibit No. 3.

(Marked Government's Exhibits Nos. 2 and 3 respectively.)

Q. Mr. Finan, this bundle that you took from Kramer comprised both types of the pamphlets, that is, each one of them? A. Yes.

Q. Well, Government's Exhibits 1 and 2, is that what you mean? A. Yes, Government's Exhibits 1 and 2.

Mr. Content: I will read Government's Exhibit No. 2 to the jury.

The Court: Read the pamphlet.

Exhibit 2 read to the jury.

Q. Now, Mr. Finan, you had gotten to the point where you had taken Government's Exhibit No. 3 from Kramer after he refused to give it to you, and one of the pamphlets in there being Exhibit 2 which was just read to the jury. Now after the arrest of Kramer and after you took the papers from him, will you tell us what happened next in the order of sequence? A. One of the other soldiers walked over

with Walker, the last man away to the end (pointing).

Q. Will you stand up, Mr. Walker (defendant Walker stands up). A. And he brought him up and he had a bundle of pamphlets in his hand, and he said, "I just took these off this man who was there giving them out."

Q. This was said to you in the presence of Walker? A. Yes, and in the presence of Kramer.

Q. So the soldier who brought him over said these pamphlets he took from Mr. Walker? A. Yes.

Q. Did you immediately write the name on the pamphlets? A. I did.

Q. You did not physically take them from him? A. No, I did not.

Q. You merely wrote the name of Joseph Walker on the pamphlets that the soldier gave you? A. Yes, sir, and then, incidentally, I took my prisoner downstairs to the main floor, the Fourth Avenue side, the 26th street entrance. I said to Sergeant Silverman immediately when I got down there that there are seven or eight more people throughout the building who are giving these out and I informed him that I saw Kramer and Becker directing the people where to go after they had given them one of these smaller bundles.

Silverman said, "I will go back with the men and look for some more." Then four or five minutes later they brought down the other defendant over there, Sternberg, who is sitting behind Kramer. As Sternberg walked up he was about five feet from where I was, where I had the other two prisoners, and he said to Walker, "How much of the stuff did they find in your possession?" Walker said, "Why, they found all I had." And then he said, "They found all I had." Then Walker said to Sternberg, "How much did they get on you?" Or, "What did they get on you?" And Sternberg says, "All they got on me was some of the pamphlets." I then stepped aside to speak to a uniformed officer where

I heard Walker and Sternberg conversing over there, but I didn't pay any attention to what they said at the time.

We then started for court. Just as they were getting ready to start, Sternberg—or Silverman, the Sergeant, said to Kramer, "Why don't you obey the Proclamation of the President, or try to?" "Oh," he said, "What do we care for the President. We all would be better off if the President was dead."

We then took them up to court.

Q. Now you took to the police court the defendants Kramer and Walker and who else? A. And Sternberg.

Q. The defendant Becker had not then been arrested? A. No, he had not, not to my knowledge.

Q. I mean he was not with the other three. A. No, he was not with us.

Q. Did anything take place at the Police Court? Did you have any conversation there? A. About ten or fifteen minutes after we got to the police court the defendant Becker was brought in by a uniformed officer. I immediately recognized him as one of the men who had been giving out the pamphlets originally, that is, with Kramer.

Q. You mean shortly after ten o'clock? A. Yes, sir. And he was the one, as I recollect it, that was told to go downstairs on the main floor of the Garden, or at least started towards the main floor. I then said to him, "I saw you when you were down in the Garden giving out pamphlets and circulating them throughout the building." And as I recollect it he said, "You didn't see me," or words to that effect. I then showed him the large pamphlets—

Q. Government's Exhibit 1? A. Government's Exhibit 1 marked, "Morris Becker, 1917," at the bottom, and I asked him if that was his name and he said it was. That was about the substance of the conversation.

Q. Now at the station house did you take the names and ages and the pedigrees of the various defendants? A. Not in the station house, in the court.

Q. In the court, in the Magistrate's Court? A. Yes, sir. I asked him for his name, on the way to court, and everything, and he refused on the way up to court. But when I got to the court he did tell me that he was 22 years old, and he lived at 208 Second Avenue. He said his name was Louis Kramer.

Q. What about the defendant Walker? A. Why, Walker gave his age as 34, he said he was born in Russia, single, and was a painter.

Q. Walker said that? A. Yes, sir.

Q. Born in Russia? A. Yes, sir.

Q. Told you that at the police court? A. At the police court.

Q. How about the defendant Sternberg? A. Sternberg said he was 24, that is, he was 24 years old and he was born in Russia, and lived at 94——

Q. You may now proceed, you were just finishing Sternberg? A. Louis Sternberg, 24, Russia, single. He stated he was a hatter and lived at 94 Rutgers street.

Q. Have you told all the substance of your conversation with them, with the four defendants on the evening of the 31st of May, 1917? A. Yes, that is all I can recollect at the present moment.

Cross-examination by Mr. Weinberger.

Q. Officer, how long have you been connected with the Police Department of the City of New York? A. Ten years past.

Q. How old were you when you joined the Police force? A. Twenty-one—about twenty-one years, nine months.

Q. You are now exactly how old? A. I am thirty-one years and six months.

Q. Where were you when—what part of the Garden were you assigned to, if any? A. Throughout the Garden.

Q. How many other detectives were in the Garden besides you? A. I could not exactly answer that; I don't know.

Q. Have you any idea? A. I have not.

Q. How many police officers were outside the Garden? A. A great many; I could not tell you.

Q. One hundred or more? A. I don't know. I should say about seventy-five.

Q. How many officers were in the lobby of the Garden as you went into the entrance? A. I didn't come by—you mean the main entrance?

Q. Yes. A. I did not go in the main entrance that night.

Q. How did you go in? A. In the back way, by the Fourth Avenue entrance.

Q. Was there any police officer there? A. No; that is, there was an inspector of police there, a couple of captains and three or four lieutenants that I saw.

Q. In uniform? A. Yes.

Q. How many officers in uniform were there in the house with you? A. I could not tell you that.

Q. How many did you see, about? A. Oh, I don't remember now. Throughout the entire Garden, do you mean?

Q. In uniform. A. Upstairs or down?

Q. On the ground floor and upstairs? First downstairs. A. What do you mean by downstairs?

Q. On the ground floor. A. The main floor?

Q. Yes. A. Why, I should judge there was probably two dozen; I could not be sure.

Q. Up in the balcony, how many officers in uniform were there, about, that you saw? A. None.

Q. In no part of the balcony? A. No.

Q. Did you see any other detective in that balcony at any time? A. I did.

Q. How many, about? A. That I cannot tell you now; I kept walking throughout the Garden and met some of the same men four or five times as they were walking through.

Q. How many did you think you met in the balcony? A. Oh, I could not tell you, I have no idea.

Q. About what time did you first see these four men together, these four defendants? A. Around ten o'clock.

Q. Had the meeting already begun, and were they breaking up? A. No, oh, no.

Q. Where did you see them? A. Up in the balcony.

Q. You are sure that the defendant Becker was up there with the other three defendants in the balcony? A. Positively.

Q. Your recollection of that is positive? A. Yes, sir.

Q. At that time did Becker have his pamphlets with him? A. He had some pamphlets, yes, sir, I don't know whether they were his, or whose they were.

Q. A bundle of pamphlets that you offered in evidence? A. He did.

Q. And you saw Kramer with him at the time? A. Yes, sir.

Q. When you saw Sternberg and Walker, did they have any pamphlets? A. Not when I first saw them; no, sir.

Q. After they got the pamphlets from Becker and Kramer? A. Yes, sir.

Q. Then what did you see Becker do, where did he go? A. Why he went downstairs.

Q. About what time? A. Around ten o'clock, quarter after.

Q. Did you see him distribute pamphlets there on the balcony? A. No, I did not.

Q. Or any of the other men at all? A. Yes, to the other men I did, yes, that is, they were distrib-

uting the bundles, I didn't see them distribute any singles.

Q. How many bundles were there, how big a bundle? A. Why, he had a large bundle on his hands, and he took off some from each bundle and handed them out to the others.

Q. Did you see those pamphlets? A. No, I did not, not at that time.

Q. Did you know what they were? A. Well, what I have seen since, yes.

Q. I mean at that time did you know what they were? A. No, I did not.

Q. You say that after Becker gave the pamphlets to Sternberg and Walker, he went out? A. Yes, sir.

Q. Carrying the bundle? A. Yes, sir.

Q. And that is the last you saw of him until he was arrested? A. Yes, sir.

Q. What did Sternberg and Walker do after they got their bundles? A. Why, Sternberg left first and went over towards the Madison Avenue side, walked around the balcony towards the Madison Avenue side, and Walker started to give them out.

Q. Did you arrest Sternberg? A. I did not.

Q. You heard some of the officers testify before the Commissioner, didn't you? A. I did, sir.

Q. You heard them state that Sternberg was arrested with the pamphlets in his pocket and he was not giving them out? A. No, I don't recall hearing that.

Q. You were in the Commissioner's room at all times? A. I was.

Q. When Kramer asked you whether you were going to register and he then told you not to register, why didn't you place him under arrest? When he said that to you? A. Well, I was not sure that there had been a violation of law.

Q. You were not sure at that time that if a man told you not to register, that was a violation of law? A. I was not.

Q. Then at one part you were or you were not? A. Well, I was undecided.

Q. Had you attended any other Conscription meetings? A. I had—no, this was the first one I had been to.

Q. Had you attended any other meetings against the Conscription, protesting against the Conscription? A. Since then do you mean?

Q. No, before then. A. That was the first one.

Q. Are you personally assigned to these cases? A. I am not.

Q. Were you at that time? A. I was assigned to the Garden on police duty.

Q. Only in reference to police duty? A. That is all, or to make an investigation if I saw any violation of law.

Q. Violation of what law? A. Of any law.

Q. Was there any specific instruction given to you about registration law? A. There was not.

Q. Has there been any instruction to the police of the City of New York in reference to No-Conscription meetings, or registration meetings? A. At that time?

Q. Yes. A. There had not.

Q. There had been quite a few meetings, for instance, at Harlem River Casino against this conscription? A. I was not there, so I don't know anything about it.

Q. You read the papers about it, didn't you?

The Court: That is immaterial.

Mr. Content: I hate to object, but it is immaterial.

Mr. Weinberger: It is material to find out whether this man knew or didn't know that when he alleges that Kramer told him not to register, whether it is true at that time he said he didn't know whether it was a violation of law.

The Court: He is not a lawyer, he is a policeman.

Mr. Weinberger: Policemen sometimes think they know more than the lawyers.

The Court: We are not discussing that.

Mr. Weinberger: The point I want to make is this:——

The Court: Objection sustained. Next question.

Mr. Weinberger: I respectfully except.

The Court: Very good.

Q. What particular precinct are you attached to? A. The Fourth Branch Detective Bureau.

Q. Have you been attending any meetings on the street at any time within the last year? A. I have not.

Q. Have you gone to any meetings during the present year when the questions of war and peace were discussed? A. I have not.

Q. Have you been under any instructions at all in reference to looking for violations of the anti-conscription or anti-registration law? A. I had not any instructions previous to this meeting.

Q. When Sergeant Silverman arrested Kramer, did he tell you what he arrested him for? A. At that time? Upstairs or downstairs?

Q. Yes, upstairs. A. No, sir, when he started the commotion I didn't ask him what he arrested him for, I simply asked him for the custody of the prisoner, when the prisoner said he would call his friends and create trouble.

Q. Then you asked for his custody? A. Yes, sir.

Q. And that was where, in what part of the Garden at that time? A. That was up on the second balcony, or the balcony next to the roof.

Q. What time did you take them over and make them your prisoners? A. About a quarter after ten.

Q. Where did you, I mean? A. I just told you that, on the balcony, next to the top.

Q. In other words, the struggle had begun up there? A. That is right.

Q. And you took him downstairs? A. I did, sir.

Q. Did you see Becker anywhere at that time? A. When he was arrested?

Mr. Content: No, at that time.

The Witness: At that time no; I seen him previous, not at that time.

Q. Did you see Sternberg? A. I did not.

Q. At that time or Walker? A. I did.

Q. Where was Walker? A. About twenty feet away from Kramer.

Q. Doing what? A. Handing out pamphlets.

Q. You were watching them both handing out pamphlets? A. Kramer more than Walker, because he had been giving instructions to the others and he seemed to be the boss of the crowd.

Q. And you watched the Sergeant arrest him? A. Kramer? Yes.

Q. Where were you when Kramer was supposed to have asked you about not registering, what were you doing? A. I was standing up in the balcony there.

Q. Were there a lot of people standing up? A. There was.

Q. How many besides yourself? A. Oh, a number of them.

Q. How many? A. They were standing up all over the Garden.

Q. How did Kramer come through the crowd to reach you? A. Why, I was in the back, he didn't have to go through the crowd.

Q. He came along, you say, handing out these pamphlets? A. Yes, sir.

Q. Which one? A. The large one, Exhibit No. 1.

Q. Exhibit No. 1. He didn't have Exhibit No. 2? A. He did not have it?

Q. Yes. A. Yes, he did, he had them in that bundle; I did not see him handing any of them out.

Q. Did he talk to anybody besides yourself? A. He did.

Q. Whom? A. Two or three other citizens there.

Q. You don't know what he said to them? A. No, I do not.

Q. Did you hear what he said? A. No.

Q. When you came along there, and he handed a man a pamphlet did he speak with each man that he —did he stop to talk to each man that he handed a pamphlet to? A. Why, no, sir; he would hand out three or four and then say something, and then walk down to the next three or four.

Q. When he handed it to you, and you asked him about it, where were you? Were you the only one, or did he hand to three or four others at the same time? A. He did not, he handed out some, I don't remember whether two or three or four.

Q. And directed his conversation specifically to you? A. Yes, because I spoke to him: I asked him what this was he was giving me, and he said "That is good advice to you."

Q. Is there any advice on People's Exhibit 1? A. I am telling you his remark.

Q. Did you look at it before you asked him what was this? A. I did not.

Q. Did you know at all that this was a meeting— an advertisement for another conscription, a no-conscription mass meeting? A. No, I didn't know it at that time, until I looked at it afterwards.

Q. You mean to say you asked him what was that, and he said "That is good advice," and then after all that you knew it was an advertisement for a No-Conscription meeting? A. That was not all, he said more than that, counsellor.

Q. What else did he say? A. When I asked him what it was, he said it was good advice. He then asked me if I was going to enroll Tuesday, or register, and I said, yes, I was. He said, Well, if you take our advice—my or our, I am not sure whether he used "my" or "our"—if you take our advice,

why you won't enroll or you won't register. He said if everybody stayed away from the polls there is not soldiers or policemen enough to make us go, but if some of us go we will all have to go.

Q. He made that big speech to you, did he? A. He made that big speech, as you call it, yes.

Q. Knowing that policemen were all around and soldiers were pretty close around him, too? A. I don't know what he knew; I cannot testify to what he knew.

Q. Were there soldiers in that balcony? A. There was not any when I spoke to him first.

Q. How long did he speak to you before the soldiers followed you in and made the arrest? A. That is, if they were there I did not see them, that is, where this was, that was in the balcony, and there were men all around, people there, and they may have been right in back of me for that matter and I did not see them.

Q. How long before the soldiers placed him under arrest did he talk to you? A. It was not a long period of time after that the soldiers placed him under arrest, it was not even——

Q. How long was it? A. Why, two or three or four minutes.

Q. That is all? A. Yes.

Q. They must have been right within the vicinity of where you and Kramer were? A. They must have been, but I did not see them.

Q. Did Kramer make this statement to you in a quiet voice? A. No, he spoke right up, loud enough so that people within three or four or five feet could hear it.

Q. Have you been reading the proclamation that the District Attorney has been talking about, of the President? A. I have not.

Q. Have you been reading any of the statements in the papers about conscription? A. I have.

Q. Or anti-conscription registration meetings? A. I have.

Q. Or anti-conscription meetings? A. I have read some of the statements in the papers, yes.

Q. Did you read any of the editorials in any of the New York papers stating that it was a violation of law? A. Well, now, do you mean previous to this meeting or since then?

Q. Yes, previous to that meeting? A. No, I did not; but I have read a whole lot since then.

Q. Do you read the papers every day? A. I do read the papers every day.

Q. Don't you see almost every day in the papers——

Mr. Content: Previous to this night?

Q. Previous to this night, yes. A. No, I was——

Q. You did read articles on conscription, or why people should register?

Mr. Content: He already answered about three times he did not.

The Court: I do not see what that has to do with this.

Mr. Weinberger: I propose here, whether or not Kramer told him not to register,—I propose here to find out why he did not put him under arrest.

The Court: Objection sustained.

Mr. Weinberger: I respectfully except.

Q. At no time in the Garden did you hear anyone else state, "Don't register"? A. No.

Q. And at no time did you hear Becker tell anyone, "Don't register," at any time during the course of that meeting? A. No, sir.

Q. You did not hear Walker say so? A. No, sir.

Q. And you did not hear Sternberg say so? A. No, sir.

Q. The only man was Kramer and he spoke to you out of fifteen thousand people in Madison Square Garden?

Mr. Content: The witness testified that he spoke to others, too, I do not see why you should put your question as one out of fifteen thousand.

Mr. Weinberger: He picked him out.

The Witness: Oh, no. I testified that he spoke to me and to other people.

Q. You don't know what he said? A. No, I do not, I was not near enough to hear what he may have said.

Q. What other soldiers did you see there besides Sergeant Silverman in the balcony? A. Oh, there was two or three others; I don't remember their names. There was one sailor—two sailors.

Q. How many soldiers arrested Kramer? A. Why, Sergeant Silverman and another man.

Q. Were you entirely alone up there, or was there a crowd around him? A. Why not at that time, but they did come up a few minutes later.

Q. Before you took the prisoner over? A. No, when they—when Walker was brought over, then I noticed another one and possibly two more.

Q. Did you take Kramer over before Walker was brought over or afterwards? A. About two or three minutes after. Kramer was taken first and then Walker afterwards.

Q. I am referring to you now, talking of Kramer? A. That is what I say; first they took Kramer and then in two or three minutes after they had taken Walker.

Q. Then Sergeant Silverman and one other man went around and took some more prisoners? A. Not together, as I knew.

Q. You did not see the others that were all before the Commissioner, the soldiers? A. No.

Q. Coming back to the statement that you claim Kramer made to you about not registering: When you went to the Garden did you know that this was a meeting to discuss peace terms and democ-

racy? A. When I went to the Garden I did not know what it was I was to do, but I was to report to Inspector Cray, of the Second Branch Detective Bureau, and I reported to him and he assigned me to the Garden; I didn't know what was going on there at all.

Q. In other words, no one told you what was going on? A. I did not ask.

Q. When you got there did you see any of their circulars handed out? A. As soon as I came there, there were some circulars out on the outside of the building being distributed.

Q. What was it that they said, something about a peace meeting? A. Something about a peace meeting.

Q. And did you see any circulars being given outside or inside the meeting other than People's Exhibits 1 and 2? A. No, I did not.

Q. Isn't it a fact that they did not allow any circulars to be given out at this meeting?

Mr. Content: He has just answered and said that they were not.

Mr. Weinberger: That they were only being given out.

The Court: He can only testify to what he saw.

Q. Isn't it a fact, there were no circulars being given out at this meeting? A. Why, these circulars were given out.

Q. Other than these circulars? A. Not to my knowledge. I said I did not see them. There might have been a lot of things happen there that I would not see, in Madison Square Garden.

Redirect examination by Mr. Content.

Q. You simply went there in pursuance of your orders? A. I was simply obeying orders.

Q. To see that the law was not violated so far as you knew it? A. So far as I knew it, yes, sir.

BENJAMIN SILVERMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Your full name is Benjamin Silverman? A. Yes, sir.

Q. You are attached to the 8th Coast Defense Command, United States National Guard? A. Yes, sir.

Q. On the 31st day of May, 1917, did you attend the meeting on peace aims and democracy or some name of that sort in Madison Square Garden in New York City? A. I did.

Q. Did you see the four defendants sitting at this table, other than Mr. Weinberger, and the two deputy marshals (indicating). A. Yes, sir.

Q. Did you see any of these men at the Madison Square Garden? A. I seen Walker and Kramer at the meeting and Sternberg I seen downstairs.

Q. Downstairs? I mean downstairs there? A. I am sure I met the two defendants, that is these two defendants.

Q. Kramer and Walker? A. Yes, sir.

Q. To which one of those two was your attention first attracted? A. I don't know his name, whether Kramer or Walker, but the defendant there with the glasses.

Q. Kramer, stand up. (Defendant Kramer stands up.) A. That is the man.

Q. That is Kramer? A. Yes.

Q. That is the one you found there? A. Yes, sir.

Q. About what time of the evening was this? A. About five or ten minutes after ten.

Q. What was Kramer doing at the time you first noticed him? A. I observed him for about—for a few minutes I observed him talking to civilians in the building, and he was handing out circulars, a large circular and small one, and he was also talking to them at the same time.

Q. By large circulars do you mean circulars of the type of Government's Exhibit No. 1 (handing paper to witness)? A. Yes, sir, that is it.

Q. And by small one you mean circulars of the type of Government's Exhibit No. 2 (handing paper to witness)? A. Yes, sir.

By the Court.

Q. Kramer was handing out circulars like these two exhibits? A. Yes.

Q. Around the building? A. Yes, sir.

Q. You saw him? A. Yes, sir, I did.

By Mr. Content.

Q. For example, suppose an ordinary civilian came along, did he hand him one of each kind of circular? A. Why, he was giving them out singly, and he was handing them out in twos, as the people came along, he did not hand them to everybody, but he was handing them out one and sometimes two and then he would make some remark.

Q. In some cases he would give them two, that is, both kinds? A. Yes.

Q. In other cases only one? A. Yes.

Q. Did you hear him talk to any of these people in civilian clothes? A. Not just then.

Q. Did you hear him later? A. Yes, sir, I did, sir.

Q. How much later? A. About five minutes I should say I walked over closer, just about three feet, and he was giving this smaller circular away.

Q. Exhibit No. 2? A. Exhibit No. 2, to some fellow, and he told him that if he read this carefully there would be some good advice to him about registering on Tuesday; and he then stated to this civilian, that if he would not go along and register, it would be a help to the cause, and if there was any trouble the society or organization which he belonged to, would be of assistance to him, and he showed them the address where to communicate in case of trouble.

Q. The address given on the bottom of Government's Exhibit 2? A. Yes, sir. I then walked over and placed him under arrest.

Q. Where were you standing during the time that he talked to this civilian? A. About two or three feet to the rear of him.

Q. You don't know who that man was? A. No, sir, I do not.

Q. You were standing at the rear of Kramer? A. Yes.

Q. You heard him say to this man,—urge him not to register Tuesday, in the words you have given to the jury? A. Yes, sir.

Q. You could hear the conversation? A. I could, sir.

Q. Was it loud? A. Loud enough so I could hear it.

Q. So that after your hearing that, you placed him under arrest? A. That I did, sir.

Q. After you arrested him, I mean after you placed your hand on his shoulder, or whatever you did, what did you do?

The Court: Becker or Kramer?

Mr. Content: I meant Kramer.

A. He started to struggle to get away from me and he said that "if I call my friends, you won't be able to take me out as easy as that," or some words to that effect. That is, "if I call my friends there will be trouble," and with that the police detective that just was here——

Q. Finan? A. Yes, sir, he came over and showed his shield to me, and requested the custody of the prisoner, and to avoid trouble I then turned the prisoner over to him.

Q. At this time did Kramer have left in his possession any of the bundle of pamphlets or leaflets that you saw him in the act of distributing? A. Yes, he still had them in his possession.

Q. He still had them? A. Yes.

Q. Did you ask him for them? A. Not then, sir.

Q. Later? A. Later.

Q. And when you turned the prisoner over to Finan, did you ask him for them? A. No, sir, I did not.

Q. Did Finan ask him for them in your presence? A. That I cannot recall, whether yes or no.

Q. You did not take Government's Exhibit 3, the bundle of pamphlets, from Kramer yourself? A. No, sir, I did not.

Q. Detective Finan did? A. Yes, sir.

Q. After you turned Kramer over to Finan,—at that time where were you, in what place in the building or in the balcony? A. On the 26th street side of Madison Square Garden, one balcony from the top.

Q. After you turned Kramer over to the custody of Detective-Sergeant Finan, what happened then? A. Another person went through there, Mr. Walker, giving out pamphlets.

Q. Was this the man you refer to (indicating one of the defendants)? A. He just was giving out these circulars, about twenty or thirty feet to the left.

Q. On the same balcony? A. On the same balcony, yes, sir, and I seen——

By the Court.

Q. Excuse me. When you say these circulars, you mean both sets, the Exhibits 1 and 2? A. Yes, sir, both of them.

By Mr. Content.

Q. Both kinds, the smaller and the larger? A. Yes, sir.

Q. Go ahead. A. I then sent Private Henry of the 69th Infantry, I sent him over to get that prisoner, to get Walker, and as Henry was approaching Walker, Walker tried to throw away the pamphlets.

Q. Were they recovered? A. They were, sir.

Q. By whom? A. By Henry.

Q. In your presence? A. Yes, sir.

By the Court.

Q. Henry was in uniform? A. Yes, sir, full uniform.

By Mr. Content.

Q. Henry was in uniform too? A. Yes, sir.

Q. In other words, who reached Walker first, Henry or yourself? A. Henry.

Q. I show you a bundle of pamphlets, which were offered in evidence before the United States Commissioner, and marked "Joseph Walker," and I ask you whether or not these are the pamphlets that you saw Walker trying to pass and throw away, and that were recovered by Henry (handing to witness)? A. Yes, sir, these are the ones; yes, sir.

Mr. Content: I offer these in evidence as Government's Exhibit No. 4.

(Marked Government's Exhibit No. 4.)

Q. Now do these comprise both types of pamphlets? A. They do, sir.

Q. That is, the same as the jury has already examined, Exhibits 1 and 2? A. Yes, sir.

Q. After Walker was arrested, by Henry, did you come up? A. I walked over to Henry and we took the prisoner there and turned him over to Detective Finan.

Q. Turned him over to Finan, too? A. Yes, sir.

Q. Then what happened? A. Why, I then went through the building as Detective Finan told me there were five or six others going around in the building, and giving out these circulars. I went through the building, and we then arrested a woman and brought her downstairs, and when I got downstairs I noticed Sternberg.

Q. Now just a minute. This is the woman that was subsequently discharged on the consent of the Government? A. Yes. And I then noticed Sternberg, the little man over here (indicating), in custody with the rest of the prisoners.

Q. You had nothing to do with his arrest? A. No, sir.

Q. In other words, the only arrest that you physically witnessed was the arrest of Kramer, made by yourself? A. Yes, sir.

Q. And the arrest of Walker made by Henry, when you yourself were but a few feet away, is that right? A. Yes, sir.

Q. You noticed Sternberg then added to the group, so there were then at this time three prisoners? A. Yes, sir.

Q. And was Detective Finan with them? A. He was, sir.

Q. Then what happened? A. I was waiting for the rest of the men to come down, that is, the men who were on my detail; and while standing there I heard Sternberg say to Walker in broken English, "How much of the stuff did they get on you?" And Walker replied, "They got all I had." Walker then said to Sternberg, "How much of the stuff did they get on you?" "Why," he says, "All I had left," or some words to that effect.

And a little while later, Sternberg said to Walker, he said, "Did they overhear the conversation of you instructing others not to register on Tuesday?" So he said, "I guess they did." He says, "There was detectives all over the house, they must have overheard us." I then done a very foolish thing, I told them anything that he would say would be used against him, otherwise I would probably have heard some more.

Q. Did anyone say anything to you after that for telling them that? A. I got a call from the detective.

Q. The detective sergeant told you not to say that? A. Yes.

Q. After you heard this conversation between Walker and Sternberg, in which Sternberg stated, or in which he admitted that they had gotten the most of his bundle and also the fact that the detective must have heard, and all that, and so forth, what happened then? A. As we were marching the prisoners out of the building——

Q. You took the three of them together. A. Why, I had Kramer in custody.

Q. You had Kramer? A. Yes, sir. And as I was walking through the streets with them, I said, "You all ought to be ashamed of yourselves. Have you read the President's proclamation?" And he says to me——

> Mr. Weinberger: I object to the testimony as already given by this officer and as to what he said while he was already under arrest, and move that it be stricken out, and I object to the statement as incompetent, irrelevant and immaterial, and no proof as far as the conspiracy is concerned, and it is simply and merely made to prejudice this jury against these defendants.

By the Court.

Q. Did he say anything to you about registration, or anything of that sort? A. I did overhear him say that to others, not to me.

Q. I mean when you were walking away, while you were speaking about the President's proclamation? A. No, sir, he did not.

> Mr. Content: This conversation, your Honor, goes to the intent of the defendants, and I ask that it be received, for that purpose. In other words, this witness started the conversation and asked him why he did not obey the President's proclamation——

The Court: I will allow it.

Mr. Weinberger: He intends to bring out some evidence which ought not to be allowed, not what they thought of the President's proclamation. Whether they said it or not, the fact is that it is brought in here purposely to prejudice this jury against these defendants.

Mr. Content: If he is going to make these remarks, he will have to be accountable for them.

Mr. Weinberger: He will be accountable, but not for any statements which are made simply and solely for the purpose of prejudicing this jury.

The Court: I will take the conversation if it was between the defendants and this man.

Mr. Weinberger: We respectfully except.

Q. You stated, Mr. Silverman, that you asked him why he did not live up to the President's proclamation, or something to that effect? A. Yes.

Q. What reply did he make? A. He said, "To hell with the President; we all would be better off if the President was dead."

Mr. Weinberger: I move to strike that out and ask that the jury be instructed to disregard it, and as having no relation whatsoever as far as the conspiracy charge here is concerned, and made merely for the purpose of prejudicing the rights of these other defendants here.

Mr. Content: It is only admissible as against Kramer.

Mr. Weinberger: It is not admissible even against Kramer. Kramer is not being charged with that remark, he is being tried here for conspiracy.

The Court: I will grant your motion as to all the other defendants, but only as to the

defendant Kramer do I allow it, and I will give you an exception.

Mr. Weinberger: And I respectfully except.

Q. Now, Mr. Silverman, they finally were all brought over to the police station? A. Yes, sir.

Q. To the Magistrates' Court? A. Yes, sir.

Cross-examination by Mr. Weinberger.

Q. Silverman, how did you happen to go up to this meeting? A. General rumor, sir, which was passed along, that there was to be a meeting there, and I went there to investigate.

Q. There were some special orders to go to the meeting? A. Why, I simply knew that there was to be a meeting from a circular that I got in Forty-second street, and I went there in response to that circular.

Q. You say you got what kind of a circular, one of the circulars in evidence here? A. No, sir, it is a circular showing that there was to be a peace mass meeting at Madison Square Garden on this evening.

Q. And you thought it was a good place to go after reading that? A. At a public meeting, yes, sir.

Q. What is your particular occupation? A. I am in the recruiting work, looking for new soldiers.

Q. Are you in the recruiting division of the army? A. I am detailed through the National Guard Headquarters for recruiting purposes.

Q. To do what? A. To recruit, sir.

Q. What are your duties, to get recruits? A. Go around to these different meetings, or go around —why, our station is up at 42nd street and Fifth avenue, and we have a detail going around the City, and we generally get out on the street corner, and we talk, and then after talking we make a request for recruits.

Q. You thought that you would have a chance to talk at the Madison Square Garden meeting? A. I thought that I might get a few recruits down there, sir.

Q. Did you think you would have a chance to make any speech there? A. No, sir, that is not my purpose.

Q. What time did you get this circular? A. The circular I got, that circular, a day or two previous to the meeting.

Q. Who else besides yourself went to the meeting? A. A sergeant, Mr. Bevins.

Q. Where did you get him? A. He is detailed at the same station, 42nd street and Fifth avenue.

Q. Where did you start from? A. Why, I started from home, sir.

Q. Where did he start from? A. He must have started from home too, I don't know where he did start from.

Q. Did you arrange with him to meet you at the meeting? A. To meet me outside of the Garden, sir.

Q. Where? A. On the Madison Avenue side.

Q. When did you make that arrangement? A. In the afternoon.

Q. Did any superior officer give you orders to go to that meeting? A. Yes, sir.

Q. Mr. Silverman, you said that you heard the defendant Kramer say that they have good advice about—that the circular has good advice about registration on Tuesday, and that if the individual he was talking to, if he would not register, he would help the cause and a society would be of assistance to him, and he showed the address where they could call for help, is that true? A. Yes, sir.

Q. And this testimony—and that is the best recollection you have as to registering—I should say the best recollection you have as to what Kramer said at that time? A. One statement you have just

made about saying about not registering on Tuesday, he did not say it was on that circular.

Q. Where on the circular does it say——

Mr. Content: He just said he did not say it was on the circular.

Q. No, but you say you heard Kramer tell people not to register, and it would be good advice not to register on Tuesday, and that if he would not register he would help the cause, and the society would be of assistance to him and showed the address on that circular where they could help? A. The society would be of assistance to him if they would get into trouble.

Q. Before the Commissioner you say as follows: "I stood behind him for awhile, and I overheard him say to one young man, 'Are you going to enroll next Tuesday?' and the young man—I don't know whether the young man said 'Yes' or 'No,' but at any rate he said, I suppose meaning Kramer, 'Well, the authorities cannot do anything to you if you do not, the law is unconstitutional. and if you get in trouble,' he says, 'they cannot do anything to you, we will be behind you.'" You do not say anything at all about registering, you merely quote that they should not enroll, and then you go on to say, "Are you going to enroll on June 5th," and by the motion of the mouth he said yes, but you could not hear the motion but you heard Kramer say, "well, now, the authorities themselves cannot do anything to you, the law is unconstitutional, if you refuse to register we will stand behind you." You do not say anything at that time about the address being right there, and that they would stand behind them. A. May I ask a question, sir? Will you look at that and see whether that is my statement or Detective Finan's statement to the Commissioner?

The Court: What page are you reading from?

Mr. Weinberger: I am reading from page 21 of the minutes.

Mr. Content: "Are you going to enroll next Tuesday," used the word "register" instead of "enroll."

Mr. Weinberger: And I read from page 29 of his testimony. Nothing is said about there is an address on there, and you can call for assistance; there is nothing in the testimony about calling for assistance. The story grows as it is told.

The Witness: This is here a trial, and the other was merely preliminary.

Q. I didn't ask you for any explanation.

Mr. Content: Yes you did, you just asked——

Mr. Weinberger: I am not arguing with you, Mr. Content.

By the Court.

Q. You answered the last question as it was put to you? A. Yes, sir, I did.

Q. And you answered such questions as were put to you in that hearing? A. Yes, sir, I did.

Q. And to-day you have answered such questions as were put to you? A. Yes, sir, I did.

By Mr. Weinberger.

Q. You were asked to give the entire conversation, weren't you, before the Commissioner? A. I don't recall, sir.

The Court: Call his attention to the question and the answer.

Q. "Will you tell us, dealing particularly (page 20) with the defendant Kramer, just what happened and what was said from the time your attention was first attracted to Kramer?" And then he goes on

that he came in at the 26th street entrance and that there he met Kramer and he saw papers, and then you give this testimony as you give it here: "Are you going to enroll next Tuesday?" and he said, "The law is unconstitutional," and then, "If you go in there," he says, "they cannot do anything to you" he says, "We will be behind you."

The Court: Is that in substance correct?

The Witness: That is in substance what I have just said.

Q. Did you place him under arrest immediately? A. I did, sir.

Q. And where was this Detective Finan at this time, Detective Finan? A. I could not say, sir, I do not know, and I didn't know the gentleman before he showed his authority to me, showed his credentials.

Q. Did you know there were detectives all over the building? A. Why, from general understanding I knew it, but I would not know them.

Q. Did you know there were police all over the building? A. Yes, sir.

Q. You did not call an officer or anyone else to arrest Kramer? A. I had authority to make arrests myself.

Q. I didn't ask you whether you had authority, I asked you whether you called a policeman or a detective who might happen to be in there to make the arrest? A. No, sir.

Q. You placed him under arrest? A. Yes, sir.

Q. Who was with you? A. Private Moroney.

Q. You took the defendant, one of the defendants, in custody? A. And I turned him over to Detective Finan.

Q. Did you go to the police station? A. I did not go to the police station.

Q. Did Detective Finan tell you at that time that he had also heard Kramer state "Don't register"? A. No, sir.

Q. Or don't enroll? A. No, sir.

Q. At any time that night did he tell you that he heard Kramer state, "Don't register"? A. I don't remember, sir.

Q. Did you get the names of any of the men that Kramer told, "Don't register," or "Don't enroll"? A. No, sir.

Q. How many people did you see Kramer talk to? A. I observed him talk to about five or six.

Q. Did you hear him, that is, hear any of the conversation with the five or six? A. I only heard one conversation, sir.

Q. Did you get the name of the man you heard him talk to? A. In the commotion he got away, sir.

Q. Where were the other soldiers? A. Why, there was two more with me.

Q. Before you arrested the defendant Kramer, how many soldiers did you get under your control or under your orders? A. Ten or twelve, sir.

Q. Why did they place themselves under your orders? A. I am the senior acting sergeant in charge of the Mayor's recruiting station at 42nd street, and I happened to be the senior ranking sergeant present in the Madison Square Garden.

Q. Before you knew there was anything going on that you believed illegal in Madison Square Garden, you had these men put under your control?

Mr. Content: He just specified he went there for recruiting purposes.

The Court: He may answer.

A. What is the question?

Q. (Question read.) A. They were under my control, sir, in the Garden.

Q. Where did you made it up, that you would all —that you were all going to meet when you were only going to this peace meeting at the Madison Square Garden? A. Men going into a meeting of

that sort, they are on recruiting duty, and they report to the nearest non-commissioned officer.

Q. Well, were all these other men on recruiting duty? A. Yes, sir.

Q. All the men that were in the Commissioner's office? A. Men out in uniform today are all on recruiting duty, sir.

Q. Are they specially assigned to that, or merely supposed to go somewhere and do some of it if they can? A. They are assigned to it.

Q. Then the men are assigned to it? A. All men in uniform.

Q. On this day when you went to Madison Square Garden, you only went there to get people to volunteer? A. Yes, sir, to volunteer their enlistment in the service.

Q. You did not expect any pamphlets or anything else to be given out that were illegal? A. No, sir.

Q. Did you see any of the pamphlets that were being given out? A. I did, sir.

Q. And before you placed Kramer under arrest? A. I did, sir.

Q. And did you read them? A. I did, sir.

Q. But you didn't attempt to arrest Kramer at that time? A. I immediately, after sending one of my men for one of these circulars, and after seeing the circular and reading its contents, I made up my mind to go through the Garden to get these people who were giving them out.

Q. Where were you when you had secured one of the circulars up in the balcony? A. In one of the boxes on the south side of the building.

Q. Then what did you do? A. Why, I immediately went up to get the people.

Q. Were there any policemen around the box where you were sitting? A. No, sir.

Q. Did you see policemen inside the Garden when you got in? A. There was cops standing at the door at the employees' entrance.

Q. Were there any on that balcony where you were when you went up to arrest Kramer? A. No, sir.

Q. When you arrested Kramer, who else did you see near Kramer? A. Walker.

Q. And did you see Becker at any time before you arrested Kramer or afterwards in that balcony? A. No, sir, I did not.

Q. Did you see Sternberg, Walker and Kramer together at that time or at any time? A. No, sir; I seen them down—after they were arrested, downstairs.

Q. Upstairs? A. No, sir.

Q. When you went to the station house with Detective Finan, did you talk over this case with him? A. I didn't go to any station house.

Q. Where did you go? A. To the Police Court.

Q. Did you talk the case over with Detective Finan? A. Not at that time, sir.

Q. Did you tell him why you arrested Kramer? A. I did, after we got there.

Q. What did you tell him? A. I told him that I arrested him on the—as far as I understood it was a Federal charge.

Q. What Federal charge? A. Why, that I could not just say; I was instructed by my commanding officer to observe and hear, and if I thought there was any violation against the new Conscription Law or anything in violation of the Federal laws, I had the authority to make an arrest, and I made the arrest on that principle.

Q. And took the place of the Police Department? A. Why, I would not say I was taking the place of the Police Department, no, sir.

Q. Well, did you tell Detective Finan what you heard and what Kramer did and why you arrested him? A. In the Police Court, sir.

Q. And did he tell you that he heard, or that Kramer had also spoken to him? A. Not at that time.

Q. And asked him not to register? A. I cannot recall whether he did or not.

Q. You would recall if he did tell you that Kramer asked him not to register, wouldn't you? A. I don't remember, sir; I cannot recall.

JAMES HENRY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are attached to the 69th New York Infantry, United States National Guard? A. Yes, sir.

Q. Did you attend this Peace meeting at Madison Square Garden on the evening of the 31st day of May, 1917? A. Yes, sir.

Q. Did you see any of the four defendants at that meeting? A. Yes, sir.

Q. Which ones? A. Kramer, Walker and Becker.

Q. Kramer, Walker and Becker? A. Yes, sir.

Q. In other words, you saw at the meeting all except the other defendant, Sternberg; is that correct? A. Yes, sir.

Q. Now, to which defendant was your notice first directed? A. Why, I noticed Kramer being placed under arrest by Sergeant Silverman, and he directed me, Sergeant Silverman——

Q. Who did? A. Sergeant Silverman.

Q. Was that in the presence of Kramer? A. No, sir.

Q. Then you better not say that. Silverman gave you some directions. Was that before Kramer's arrest? A. After Kramer's arrest.

Q. Was Kramer there when he told you that? A. No, sir.

Q. He was not? A. No, sir.

Q. Had he handed Kramer over to the detective at that time? A. Yes, sir.

Q. The man whom you knew afterwards to be Detective Finan? A. Yes, sir.

Q. You didn't know Finan before that? A. No, sir.

Q. Then you saw Kramer being arrested by Silverman, is that correct? A. Yes, sir.

Q. And then did you see Finan take charge of Kramer? A. Yes, sir.

Q. Well, then, tell us what you did then, not what Silverman, that is, Sergeant Silverman said to you, but what you did? A. I noticed Kramer being placed under arrest and I noticed defendant Walker.

Q. Stand up, defendant Walker. (Defendant Walker stands up.) Is that the defendant you have reference to? A. Yes.

Q. What did you notice Walker doing? A. Giving out one or two of the pamphlets to the men.

Q. What kind? Have they been offered in evidence here too? A. Yes, sir, Exhibit No. 1.

Q. Exhibit No. 1? A. Yes, sir. And Sergeant Silverman instructed me to place Walker under arrest. I immediately made a move towards Walker. Walker then laid down the pamphlets.

Q. Was this on that same balcony on which Kramer was arrested? A. Yes, sir.

Q. How many feet would you say Walker was away from Kramer? A. About twenty feet away. I went up and first Walker placed down the pamphlets, and I went up and grabbed him by one arm, and at the same time I reached for the pamphlets and got possession of the pamphlets. Then I brought the defendant——

Q. I show you Government's Exhibit No. 4 with the name Joseph Walker written on there by Detective Finan, and I ask you whether these are the pamphlets you took from Walker as he was trying to throw them away (showing papers to witness)? A. Yes, sir.

Q. You identified those before the United States Commissioner originally in the preliminary hearing? A. Yes, sir.

Q. You stated, didn't you, that Walker tried to put them out of the way as you approached? A. Yes, tried to lay them down.

Q. You grabbed Walker with one hand and the papers with the other; is that your testimony? A. Yes, sir.

By the Court.

Q. Just before that, had you seen Walker hand these pamphlets to anyone? A. Yes, sir.

Q. To how many people did you see that? A. I should say about a couple of people before I reached him.

Q. A couple of people before you reached him? A. Yes, sir.

By Mr. Content.

Q. Before you got to Walker, you saw him give them out to a couple of people? A. Yes, sir.

Q. By that time you were up with him? A. I was up to him.

Q. And then he tried to put the pamphlets down and immediately you took hold of him with one hand and the pamphlets with the other? A. Yes, sir.

Q. Was Sergeant Silverman right behind you? A. Yes, sir.

Q. And you finally arrested him? A. Yes, sir.

Q. What did you do? A. Sergeant Silverman took hold of him and then we brought him over by the arm and turned him over to Mr. Finan.

Q. Turned him over to Finan too? A. Yes, sir.

Q. And Finan had two prisoners by this time? A. Yes, sir.

Q. What happened next, Mr. Henry? A. I went downstairs and just before we reached the bottom he took off the—Kramer took off his hat and started

waving it and made these remarks: "Be sure and tell the Chief," or words to that effect.

By the Court.

Q. Kramer said it? A. Yes, sir.

By Mr. Content.

Q. Kramer said that to somebody you didn't know? A. Yes, sir.

Q. Somebody not under arrest? A. Yes, sir. A detective took the prisoners over to the other end of the hall and placed them there; in pursuance to orders from Sergeant Silverman I went around the hall to see if I could notice anybody else giving out these no-conscription circulars.

Q. You were not there when Sternberg was added to the other two, were you? A. No, sir.

Q. So you went about the hall pursuant to your orders to see if anybody else was giving out circulars of the type of Government's Exhibits 1 and 2? A. Yes, sir.

Q. What part of the hall did you go to next? A. I walked all around the hall a couple of times; and around ten-thirty, I was going out the main entrance and I noticed the defendant Becker in the midst of a crowd surrounded by seven or eight persons giving out circulars.

Q. You saw Becker physically handing out these circulars? A. Yes, sir.

Q. Or leaflets? A. Yes, sir.

Q. How many people do you suppose you saw him give them to before you arrested him? A. Why I should say about seven or eight.

Q. He was distributing them promiscuously? A. Yes, sir. I immediately, when I was sure he was giving out these no-conscription circulars, placed him under arrest.

Q. Did he have any circulars with him in his possession at the time you placed him under arrest? A. Yes, sir.

Q. Now, I show you a bundle of circulars that were offered in evidence before the Commissioner, and I ask you whether or not they are the circulars you took from Becker (handing same to witness)? A. Yes, sir.

Q. And do they comprise both kinds of papers, that is, Exhibits 1 and 2? A. Yes, sir.

Q. The smaller and the larger? A. Yes, sir.

Mr. Content: I offer these in evidence. I am offering this bundle as a whole, so as to give them one number only.

Received in evidence and marked Government's Exhibit No. 5.)

Q. Then what did you do with Becker?

By the Court.

Q. Did Becker have this bundle No. 5 in his hand? A. Yes, sir.

Q. And you took it from him? A. Yes, sir.

By Mr. Content.

Q. What did you do with Becker then? A. I turned him over to the lieutenant of the police there.

Q. A uniformed lieutenant? A. Yes, sir. I notified him I would make a charge against him and he said all right, and he told one of the officers stationed nearest the entrance of the hall and told him to take the prisoner along to the station house.

Q. And did you go along ? A. Yes, sir.

Q. Is that all that you had to do? A. On the way over to the station house the defendant Becker claimed that he did not know what he was giving out; that somebody just handed him these pamphlets and he just was going to give them out, not knowing what they were.

Q. Claimed he did not know what he was giving out, that somebody gave them to him and he didn't know what he was giving out? A. Yes, sir.

Q. Was that all the substance of the conversation on the way to the station house?

Mr. Weinberger: Becker or Walker?

Mr. Content: Becker.

Q. Is that your answer that Becker on the way to the station house claimed he did not know what he was giving out. Is that right? A. Yes, sir.

Q. Have you told us everything you had to do with this meeting? A. Yes, sir.

Cross-examination by Mr. Weinberger.

Q. Becker stand up. (Defendant Becker stands up.) You mean to say that this defendant told you on the way to the station house he did not know what he was giving out? A. Yes, sir.

Q. You are absolutely sure of that, are you? A. Positive. The officer that was with me overheard the conversation also.

Q. The officer, if there was any, overheard the conversation, you say? A. Yes, sir.

Q. Officer Finan? A. No, sir.

Q. What officer? A. An officer in uniform.

Q. Is he here? A. Yes, sir.

Q. What is his name? A. I think his name is Dexter.

Mr. Weinberger: Is Officer Dexter in court?

Mr. Content: I did not subpoena him, Mr. Weinberger.

Q. Did anyone tell you on the way to the station house or in the station house that the giving out of these circulars was not a violation of law, but that you had to get something in addition? A. No, sir.

Q. Did you hear any of the other officers or detectives discussing the proposition that the giving out of these circulars was not a violation of law? A. No, sir.

Q. You have no feeling against the defendant and do not want to add anything so as to make sure they get convicted? A. No, sir.

Q. When you say that Walker tried to drop the circulars as you went to arrest him, you are not stating that merely because that tends to show a guilty conscience, are you? A. No, sir.

Q. That fact is a thing you imagined a man with a guilty conscience would try to do? A. No, sir.

Q. You are not stating that Becker told you he didn't know what was in the circulars, you are not saying that because you also think that will show that he had a guilty conscience?

Q. And he was trying to get out of it? A. No, sir.

Q. Isn't it a fact that when you arrested Becker he had just gotten these pamphlets from the checking room of Madison Square Garden? A. I don't know, sir.

Q. Isn't it a fact that he had not given out a single one at the time that you placed him under arrest? A. I noticed him giving them out.

Q. He was right by the check room, was he not, on the way out? A. I don't recall just where the check room is; I could not say.

Q. Where did you arrest him? A. Why, right in the hall itself; there is a little hall there which leads from Madison avenue right into the main hall.

Q. Didn't you see the checking room right near where you arrested the defendant Becker? A. I didn't notice.

Q. Didn't you notice anything except the fact that you grabbed this man? A. I cannot—I cannot recall where the rooms are located; I noticed that there was some rooms on either side of the hall there, I didn't pay any attention to them.

Q. You did not hear any of these defendants at any time state or tell people not to register? A. No, sir.

Q. Did Becker state it? A. No, sir.

Q. Did Walker state it? A. No, sir.

Q. The only thing you want to testify is that this man was giving these pamphlets out? A. Yes, sir.

Q. And that Walker seemed to have a guilty conscience at the time and that he tried to drop them?

The Court: He didn't say anything of that sort.

Mr. Content: He didn't say anything about that.

Mr. Weinberger: I mean that is the inference he wants the jury to have that he drew or tried to draw.

Mr. Content: He don't want the jury to draw any inference, he told what he saw.

The Court: In answer to that question he said "no."

By the Court.

Q. You are just telling what you saw? A. Yes, sir; what I saw and heard.

By Mr. Weinberger.

Q. You are not adding to what Walker did by saying that he tried to drop those? A. No, sir.

Q. Did he drop them? A. He did, sir, or tried to.

Q. And you picked them up, what you thought he had dropped? A. He tried to drop them, that is, he is putting them down on the floor when I grabbed his hand, and I got hold of his arm with one hand and I grabbed hold of the leaflets and he laid them down, with the other——

Q. And he was letting them go at the time you grabbed hold of him, wasn't he? A. I could not say that for sure.

Q. How did you grab him, from the rear or the front? A. From the rear.

Q. Why should he want, at that particular moment, to put them down?

Mr. Content: How does he know why Walker should want anything?

Mr. Weinberger: If he knows.

The Court: Objection sustained.

Q. Was there any officer there to arrest Walker at that time? A. Why, Sergeant Silverman was there and he placed Walker under arrest and took him away.

Q. Where was he? A. Right in back of me.

Q. Back of whom? A. Back of me, as I placed Walker under arrest.

Q. Walker did not see him or you, that is, you or Sergeant Silverman? A. I could not say that.

Q. You don't know whether Walker was trying to bend down to do anything else? A. Why, according to the way I saw it he deliberately tried to lay down those papers.

Q. There was a crowd around there at the time? A. Not a big one, some people.

Q. Where were you when you placed Walker under arrest? A. About twenty feet from Mr. Kramer, when he was placed under arrest, he was.

Q. And after you arrested Walker what did you do with him? A. Why, I walked Walker over to where Detective Finan was standing, assisted by Sergeant Silverman and turned Walker over to Detective Finan.

Q. Then what did you do? A. I went downstairs behind the two prisoners.

Q. And when did you get Becker? A. Why, that was about fifteen or twenty minutes later.

Q. Where? A. In the entrance to the main hall.

Q. Did Becker, did he tell you that he was Maurice Becker that drew that picture (indicating)? A. No, sir, he did not tell me.

Q. You went with the officer to the police station? A. I did, sir.

Q. Did you hear him at any time state that he was Maurice Becker? A. Why, the name he gave at court was Morris Becker, at the station house.

Q. And you want to say, and want this jury to believe, that Morris Becker told you that he didn't know what he was giving out? A. Yes, sir, that is the words he used to me.

Q. You also want this jury to believe that he was actually giving these leaflets out at that place? A. Yes, sir.

LAWRENCE BEVINS, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are an enlisted man in the United States Navy? A. I am.

Q. And at present being assigned to recruiting where? A. 42nd street and 5th avenue.

Q. The same place Sergeant Silverman was assigned to? A. Yes, sir.

Q. Did you attend the meeting at Madison Square Garden on the evening of May 31st, 1917? A. Yes, sir.

Q. Did you see any of these four defendants at that meeting? A. After the arrest I saw him.

Q. Whom did you see before the arrest? A. Well, I personally arrested Sternberg.

Q. Wasn't he the first one you saw? A. No, I saw the others under arrest before I arrested him.

Q. There were others under arrest first? A. Yes, before I arrested him.

Q. Did you see Kramer arrested by Sergeant Silverman? A. No, sir; I saw him shortly after that.

Q. You saw him shortly after that? A. Yes, sir.

Q. Saw Walker under arrest at that time, too? A. Yes, sir.

Q. So when you first saw Kramer and Walker they were under arrest? A. Yes, sir.

Q. Were they in the custody of Detective Sergeant Finan? A. Yes, sir.

Q. After they were arrested what happened? A. Sergeant Silverman ordered me to go out--there was three of us, ordered us to go out into the Garden and see if we could find anyone distributing literature.

Q. Distributing literature? A. Yes, sir.

Q. Where did you go? A. I went down on the ground floor, that was on the 26th street side; I saw from the opposite side on the top balcony papers coming down and another fellow was with me from the 22nd Engineers by name, Bowen, and he was on the top balcony on the 27th street side.

Q. You saw what? A. I saw these papers coming down.

Q. You saw them dropping down from the top balcony on which side? A. On the 27th street side.

Q. On the 27th street side. That is the north side of the building? A. Yes, sir. We went up there and found this Sternberg.

Q. Stand up Sternberg. (The defendant Sternberg stands up.) Is that the man you referred to? A. Yes, sir, and another person with him.

Q. Somebody you did not arrest? A. I did not arrest him.

Q. Did Sternberg have anything in his possession? A. He had these papers in his pocket, they were behind him, he had them in his pocket.

Q. I show you a bundle of papers that you identified before the United States Commissioner and which Mr. Finan has identified by writing the name "Sternberg" on them? A. Yes, sir.

Q. And I ask you if that is the one which you have been talking about—those are the papers that you have been speaking of which you saw from down below (handing same to witness)? A. Yes, sir.

Q. Those are the same ones which you had? A. Yes, sir, also there was a little card which had a place for putting the name and address on where they asked you to send something, you were sup-

posed to put your name and address on it and send it to them.

Q. That has been lost, has it? A. That was turned over to one of the Secret Service men, that was down below.

By the Court.

Q. Is that little card in the bundle? A. In with the other stuff.

Q. That was in his hand? A. He had it on him when I got the bundle, he had them in his pocket.

Q. Did you see Sternberg give these circulars to anyone? A. They were being dropped from the balcony.

Mr. Content: I offer this bundle which was taken from Sternberg in evidence.

The Court: Received.

(Received in evidence and marked Government's Exhibit No. 6.)

Q. They were being dropped from the balcony? A. Out from the balcony, on the south side of the building, that is, the 27th street side.

Q. You were downstairs? A. I was down below on the ground floor.

Q. Could you see who it was that was dropping these down? A. It was one of these two men, they were all around both of them——

Mr. Weinberger: I move to strike that out. He said he didn't see which did it, he does not know who did it.

The Court: That may be stricken out.

Q. But you saw some papers coming down from the balcony? A. Yes, sir.

Q. When you reached upstairs to the balcony what did you see? A. I saw the men in that section between the two posts, that is, there were only two men.

Q. Only two men there? A. Only two men in that section and to the best of my knowledge——

Q. Then you went up into the balcony? A. Yes, sir.

Q. When you got there you saw two men? A. Yes, sir.

Q. And one of them was the defendant Sternberg? A. Yes, sir. And a young man was with him.

Q. Did the young man have anything in his possession? A. The other person, I did not see, I did not search, but this was in the side pocket of this defendant.

Q. You saw them on Sternberg personally? A. Yes, sir.

Q. And you placed Sternberg under arrest? A. Yes, sir.

Q. Where did you take him? A. I took him down below and handed him over to Detective Finan with the other prisoners?

Q. That is Kramer and Walker? A. Yes, sir; before that I asked him where he got his pamphlets. He spoke to me in English that he didn't know where he got them. I asked him what he was going to do with them. Then the other person gave me a reason, he wanted to talk for him, he wanted to answer for him and I told him to never mind and keep still, I didn't have anything to do with him and I was talking to the other man. Then I asked him what he was going to do with the pamphlets and he said he didn't know.

Q. Then he said he didn't know? A. Yes, sir.

Q. After he was placed under arrest and put with the others, with the other two prisoners, did you hear any conversation between any of them? A. I did not hear any between the prisoners; I saw them talking but I could not understand what they were saying. I believe Sergeant Silverman told them to keep still.

Q. Said that to whom? A. To the prisoners to keep still.

Q. Which one? A. Sternberg and Walker, and that anything they said would be used against them.

Q. You heard Silverman warn them? A. Yes, sir, and then I heard Finan call him down for it.

Q. You heard Finan call Silverman down for it? A. Yes, sir.

Cross-examination by Mr. Weinberger.

Q. Did you hear any of the soldiers or the detectives talk between themselves that it was not enough against these defendants that they merely gave out these pamphlets? A. No, sir.

Q. Did you hear them at any time state that they had to get something, some evidence, about telling the people not to register? A. To the best of my knowledge, no.

Q. You have no personal grudge against these defendants? A. Never saw them before, this is the first time.

Q. You are not at all inclined to stretch your testimony in any way to bind these defendants? A. No, sir.

Q. Now, isn't it a fact, that these men were arrested for giving out these leaflets, Government's Exhibits 1 and 2, and after that it was made up to say that these men, or rather Kramer, told people not to register? A. No, sir.

Q. And that there was not enough, according to law, to hold them by giving out simply these pamphlets? A. No, sir, no talk about Kramer.

Q. About any of them, Kramer or the four of them? A. I don't know about that. I was ordered to find any more that was giving out literature; that is all I did.

Q. In other words, the soldiers were of the opinion and you were of the opinion at the time that these pamphlets were being giving out, that that

was a violation of law? A. I didn't know about the rest of them.

Q. That was your opinion? A. My opinion, yes, but I have been unable and am unable to answer for the rest of them.

Q. And that was the instruction Sergeant Silverman gave out, to arrest anybody who gave these pamphlets out? A. The way he put it, "find any more—" see if I can find any more of the rest of them. That is the way he worded it.

Q. Giving out these pamphlets? A. He didn't say it.

Q. What did you think he referred to? A. He referred to it that way. I don't know anything about them except what they had done.

Q. At the time you arrested Sternberg you were of the opinion that it was a violation of law to give these leaflets out? A. Yes, sir.

Q. You didn't see Sternberg give any of them out? A. I saw them dropping from the place he was at on the balcony.

Q. Did you see him give them out? A. I was not close enough for that.

Q. When you arrested him, he had them in his pocket? A. In his pocket.

Q. Listening to the speakers at the time? A. I thought he could not understand English.

Q. What? A. I thought he could not understand English.

Q. You can understand English without being able to talk it, don't you know that? A. I don't know; I don't know; I am not a Russian.

Q. He went to the meeting, didn't he? A. Seems so, yes, sir.

Q. Sat in a seat like the others listening? Or looking towards where the speakers were, is that right? A. No, sir, he was looking across to the other side.

Q. The other side of what? A. The building there, the speakers were like over on this side and

he was like over on the other side of the building (indicating).

Q. That is, over toward you? A. He was on the same side as the speakers and he was looking over to the other side of the building away from the speakers.

Q. But he could have heard the speakers at the time? A. Yes, sir.

Q. And he was looking down when you came up behind him and arrested him? A. No, sir, he was looking across.

Q. Oh, looking across. And he didn't see you when you came up behind him to arrest him, did he? A. I don't know.

Q. You didn't come from the side, you came from the rear, didn't you? A. I came from the side.

Q. How far from the side? A. All the way down on the front row, of front seats.

Q. You were downstairs, weren't you? A. I came up and walked right around in front.

Q. He was on the balcony above you? A. No, sir, on the same balcony. I had been down on the ground floor and came all the way up to the top balcony.

Q. You did not see him drop these down, did you? A. It was a little hard to see all the way up there but one of these men was dropping them.

Q. When you saw one of these two men dropping them or you say you saw them dropping them, they were being dropped in that particular section? A. They were the two men, they were the only two men that were in that section and they were dropping them to the best of my knowledge, and I think it was Sternberg, it came down below from him.

Q. And when you got there and placed them—that is, placed Sternberg under arrest, he had these in his pocket? A. Yes, sir.

Q. And he was looking across Madison Square Garden? A. Yes, sir.

Q. And you placed him under arrest? A. I did.

Q. For having these things in his possession, is that right? A. Yes, sir.

Q. At that time, then, you thought that having these in his possession, or anyone having these leaflets or pamphlets in their possession, was a violation of law? A. No, but anyone like he had them, yes, sir.

Q. That was your opinion at that time? A. Yes, sir.

Q. And that is why you placed him under arrest? A. Certainly.

Redirect examination by Mr. Content.

Q. You were of the opinion it was Sternberg that was distributing these things in the balcony? A. Yes, sir.

Q. And then you went up and when you got there you saw these two men? A. The defendant Sternberg had the bundle of stuff.

Q. And you, thinking that it was he who distributed them, you placed him under arrest? A. From below I thought it was Sternberg.

Q. From below the same man that you subsequently saw up there was the man that you arrested, and that is why you hurried up from below? A. Yes, sir.

Q. And you found these things, these pieces of paper in his possession and placed him under arrest? A. Yes, sir.

Q. And you asked him what he was going to do with them and he said he didn't know? A. Yes, sir.

Q. You are not a lawyer? A. No, sir.

Recross-examination by Mr. Weinberger.

Q. You didn't know at that time anything about people going around in that meeting and telling people not to register? A. No, sir.

Q. You didn't hear any remarks between the officers at that time that that was what was necessary to make out a case? A. No, sir.

Q. Or at any subsequent time? A. I heard that afterwards.

Q. You heard that afterwards from whom? A. I don't know who said it, but I heard it up in court, I guess.

Q. One of the officers said it, do you mean? A. No, I don't remember who specially had said, but I heard—I do remember that I heard something about it.

Q. That it was necessary to make out the case? A. I didn't hear the word "necessary," no, sir.

Q. Was there anything said at that time that you got to say that these men told people in Madison Square Garden not to register in order to have them held by the Federal Grand Jury? A. No, sir.

Q. If you did hear it would you tell me, or tell it to this jury? A. Why, certainly.

Q. You have no feeling that because you are in the service of the United States that anyone that fights against conscription ought to be in jail? A. No, sir.

Q. You have no feeling that anyone that made a protest against registration or conscription ought to be in jail, have you? A. Personally, I don't like to give my opinion.

Mr. Content: Answer the question anyhow.

Q. You don't like their opinion, but do you feel that if the citizens that have that opinion—do you feel that they have a right to hold a meeting and ask for the repeal of any law? A. I don't know anything about the law.

Q. I am asking you about your feelings, yourself, now. I am not asking you about your knowledge of the law. A. I do not see any objection to holding meetings.

Q. But you do feel that this was a violation of law? A. Why, certainly.

Q. And this is why you placed him under arrest? A. Yes, sir.

Q. And this man, adding now about Kramer talking to people about not registering, you don't know anything, one way or the other, how that came into this case? A. No, sir.

Mr. Content: He has not testified to any man making that statement or overhearing any conversation.

Mr. Weinberger: I am not asking if he overheard any conversation.

Mr. Content: He is a perfectly truthful witness.

Mr. Weinberger: I want to know whether he knows how these things came into the case.

The Court: It is perfectly evident and obvious that he don't know what other people have said for he was not there.

Mr. Weinberger: I am not asking him only for what he heard now.

The Court: He said no. I understand what you asked him and he understands what you asked him. He answered you.

Mr. Weinberger: But Mr. Content is trying to twist it.

The Court: Ask your next question.

Q. Right before the meeting or the hearing before the Commissioner, was anything discussed between the officers and the detectives? A. Where was that?

Q. Before the hearing before the Commissioner when the four men and the woman were brought up before a Commissioner, did you have any general conversation? A. We had a conversation with Mr. Content, the day after the defendants—I believe it was the day when the warrant was issued and also the other day.

Q. And before you went into Mr. Content's office, didn't you have a general conversation with the others? A. No, sir.

Q. As to what you were going to testify to? A. No, sir.

Q. That some of them were going to say that Kramer told people not to register? A. No, sir, I had nothing to do with that part of it.

By the Court.

Q. As I understand you, you were under the orders of Sergeant Silverman, were you not? A. Yes, sir.

Q. Who was the highest ranking non-commissioned officer present? A. Yes, sir.

Q. And it was your duty to carry out any order given by him? A. Yes, sir.

Q. And when you saw some of these circulars or pamphlets dropped from the balcony from where you stood, you thought it was dropped by Sternberg? A. Yes, sir.

Q. And you went right up and arrested him? A. I say, that I stood behind him and to see if he would drop any more, but I didn't see him.

Q. Where were these things—were they sticking out of his pocket? A. Yes, so I could read a part of it from behind.

Q. And you then arrested him? A. Yes, sir.

Q. And this whole procedure was pursuant to your obedience to orders? A. Yes, sir.

CLIFFORD HEARD, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Heard, you are attached to the First Field Artillery, New York, of the United States National Guard? A. Yes, sir.

Q. You are assigned to recruiting duty also? A. Yes, sir.

Q. Did you attend the meeting at the Madison Square Garden on the evening of May 31st, 1917? A. Yes, sir.

Q. Tell us what part you took in the arrest of any of these defendants? A. All I did was I saw Kramer arrested and Walker was held.

Q. You simply saw them arrested? A. Yes, sir.

Q. You saw Sergeant Silverman place Kramer under arrest? A. Yes, sir.

Q. You were not taking any active part in that yourself? A. Yes, sir.

Q. Did you overhear any conversation of any sort? A. As we were leaving the employees' entrance of the building I heard Kramer say to somebody on the stairs, "Let the Chief know about them."

Q. Tell the Chief about it? A. Yes, sir.

Q. Is that all you heard? A. That is all the conversation I heard.

Q. Did you hear any other conversation of any of the other defendants? A. No, sir.

Mr. Weinberger: I move to strike this evidence out as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Weinberger: As not binding on the others or anything to do with the conspiracy.

Mr. Content: I think that shows that there were persons present that were in all probability under this man's direction, and this conversation would seem to show that.

The Court: The objection is overruled.

Mr. Weinberger: I respectfully except.

Q. That is all you had to do with it? A. That is all I had to do with it.

HARRY BAULAND, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Bauland, you are attached to the 22nd Regiment of Engineers, of New York, United States National Guard? A. Yes, sir.

Q. You are assigned to recruiting duty also? A. Yes, sir.

Q. Did you attend this meeting at Madison Square Garden on the evening of May 31st, 1917? A. Yes, sir.

Q. Did you see any of these defendants at that meeting? A. Well, the first one I noticed was Kramer.

Q. Kramer? A. Yes, sir.

Q. Was that prior to his arrest or after his arrest? A. Before his arrest.

Q. Where was this, what part of the Garden? A. Next to the top balcony.

Q. On which side? A. I don't remember the side. I think it was the 26th street side.

Q. Next to the top balcony? A. Yes, sir.

Q. What was Kramer doing there? A. What was he doing there?

Q. Yes, when you first observed him? A. Well, I saw him give out a circular there, hand it to Detective Finan.

Q. Detective Finan, do you mean this gentleman that was a witness here? A. Yes, sir.

Q. Do you know Detective Finan personally? A. No, sir.

Q. You saw him there and since then you have known him as Detective Finan? A. Yes, sir.

By the Court.

Q. Did he give a circular to somebody before he gave it to Finan? A. Yes, sir.

Q. To some other citizen? A. Yes, sir.

Q. Then after that you saw him go over to Finan? A. Yes, sir.

By Mr. Content.

Q. Finan was also in civilian clothes? A. Yes, sir.

Q. So for all you knew, Finan was a civilian? A. Yes.

Q. Not a police officer? A. No, sir.

Q. So that you saw him hand a circular to a man in civilian clothes, and after that you saw him hand one to another man also in civilian clothes and whom you now know to be Detective Finan? A. Yes, sir.

Q. Now, did you hear him say anything to Finan? A. Yes, sir. I was standing about three feet behind him when he handed that circular to Detective Finan and I heard him say—Detective Finan asked him what it was, and he said there is a lot of good information for you. Then he asked him if he was going to register Tuesday. I did not hear what the detective said.

Q. You did not hear Finan's answer, but you heard Kramer ask him if he was going to register on Tuesday? A. Yes, sir. Then he said if none of us register they haven't got police officers and soldiers enough to make us register, but if some of us register we will all have to register.

Q. Is that the substance of the conversation? A. That is all I heard.

Q. After he had finished, he walked away, is that correct? A. Well, he walked—moved a little away and then Sergeant Silverman saw Kramer giving them out and Sergeant Silverman, he came up and put him under arrest, I had nothing to do with the arrest.

Q. You had nothing to do with his arrest? A. No, sir.

Q. You stood behind Finan at the time that Kramer was talking to Finan? A. Yes, sir.

Q. You didn't know who Finan was at that time? A. No, sir.

Q. And he may have been anybody? A. Yes, sir.

Q. After the arrest of Kramer, what happened? A. I walked around the balcony then, I did not stay there.

Q. What did you go to do? A. Well, after I saw the circular that was given out, I went around to find if I could get anybody giving them out.

Q. Giving out more circulars? A. Yes, sir.

Q. Did you find anybody else giving them out? A. No, sir; I walked the opposite way.

Q. You went the opposite direction? I presume by that you mean—which side of the Garden? A. I went around Madison avenue side.

Q. Anybody giving them out there? A. No, sir.

Q. The only one whose arrest you had anything to do with was Kramer? A. Yes, sir.

Q. Did you see Walker arrested, too? A. I didn't see him arrested; I saw them all together downstairs.

Q. You did? A. Yes, sir.

Q. How many were there downstairs? A. Oh, there were three or four.

Q. And he was among those that were arrested and downstairs? A. They were all under arrest.

Q. After they were arrested how many were there altogether? A. There was five of them, I believe.

Q. Five? A. Yes, sir.

By the Court.

Q. Who were the five? A. There was Kramer, Sternberg, Walker, and there was some woman there.

By Mr. Content.

Q. Was that the woman that was discharged on the consent of the Government; is that it? A. Yes,

sir; there was another woman there but they just chased them away—another woman and another gentleman were ordered by the police away. They were over there and the police chased them away.

Q. They were not arrested? A. No, sir, they were not under arrest.

Q. Had Kramer, Walker, Sternberg, who are now defendants in this court—they were there? A. Yes, sir.

Q. And a woman that was discharged later? A. Yes, sir.

Q. And some people who were not placed under arrest and whom the police told to move along, move away? A. They were, they were there, there were some women there.

Cross-examination by Mr. Weinberger.

Q. Before Mr. Content led you and called your attention to the fact that the five had not been arrested at the same time, where did you get the idea that there was five arrested? A. Well, there was a couple—there was woman, another gentleman, there were two women that was discharged from the case.

Q. There was five under arrest? A. There was six, there would be five—I don't know who was under arrest then, not until they took them to the police court, or not until the police chased these other two away.

Q. Isn't it a fact that the reason you said five was under arrest was that you saw five downstairs? A. No, sir, that is——

Q. Wait a minute. I haven't finished my question. Was that you saw five downstairs, four were held and one was discharged? A. No, sir; I saw the five that were there then.

Q. You don't want your story to not fit into the curve with the stories that the others have told? A. I am just telling what I saw.

Q. You don't think you are saying it because it is the right number to make up with the number of defendants here, and the one that was discharged? A. No, sir, I am just telling you what I saw.

Q. If Mr. Content had not called your attention to the fact that the five were not arrested at one time, you would still be just as sure as before that there were five there? A. I saw Becker, and I know that I called out to the officer Henry of the 69th Regiment——

The Court: He didn't say five of them were under arrest, he said he saw five downstairs.

Q. Did you mean five defendants under arrest?

The Court: Not at all, he has not testified to that at all. That is not it.

Mr. Content: There are not five defendants. There never were.

Mr. Weinberger: Four defendants here and one woman who was acquitted, that makes five.

Mr. Content: She was not acquitted; she was discharged before the case was ever considered by the Grand Jury.

Q. You say that you heard Mr. Kramer tell Detective Finan not to register. Did you put Kramer under arrest?

The Court: He did not say that.

A. I did not place him under arrest.

Q. Did you attempt to place him under arrest? A. No, sir.

Q. Did you call anyone to arrest him? A. No, sir.

Q. Did you go down and report to Sergeant Silverman what you had heard? A. No, sir, I did not report to anybody.

Q. You just stood right there and heard him say that, didn't you? A. Yes, sir.

Q. And that there would not have been enough soldiers or policemen to arrest them, if they wouldn't all register? A. Yes, sir.

Q. And you did nothing? A. I did nothing.

Q. When you saw what the circulars were he was giving out? A. I did not see them—I had not seen them at that time, no, sir.

Q. How far were you away? A. I picked one up a minute or so later.

Q. You did not see him give out a lot of circulars to other people? A. I saw him handing them out but I did not get one of them.

The Court: He did not see the circulars at all.

The Witness: That is, not until after then.

Q. You didn't know how many circulars were given out? A. No, sir.

Q. You didn't know how many people got them before Detective Finan got them? A. No, sir.

Q. How did you come to go there? A. I went there the same as any other citizen; I got one of these slips at 5th avenue and 42nd street, telling of this meeting.

Q. You did not go there thinking you could get recruits in this peace meeting, did you? A. Certainly I did.

Q. You thought you could get recruits there, did you? A. Yes, sir.

Q. That is what you went there for? A. Yes, sir.

Q. You didn't go there to disturb the meeting? A. No, sir.

Q. You were not one of the group that disturbed that meeting?

Mr. Content: There is no evidence that anybody did.

The Court: There is no such charge.

Mr. Weinberger: I asked him whether he was one of the group that disturbed the meeting.

Mr. Content: That is an improper question.

The Court: There is no evidence at all that the meeting was disturbed.

Q. Did you see the disturbing of the meeting by the soldiers? A. There was not any disturbance there.

Q. Did you not see that? A. No, sir.

Q. Did you hear Dr. Magnes state— A. I did not hear Dr. Magnes.

Q. Listen to my question and don't be so sure you didn't hear anything you are not supposed to hear——

Mr. Content: Wait a moment. That is an improper remark.

The Court: Yes, it is.

Mr. Weinberger: I submit his answering before I even state the rest of the question shows that he wants everything to fit right in.

The Court: Now, what is the use of making such a remark as that, he was answering questions that you put to him.

Mr. Weinberger: He was answering too fast.

The Court: He is answering as he is asked. You keep on asking questions and he will answer them.

Q. Did you hear Dr. Magnes state from the platform that the crowd should be absolutely quiet, that the soldiers were trying to disturb the meeting, was what the police called a plant?

Mr. Content: I object to anything Dr. Magnes said as nothing to do with this mat-

ter at all, and as a matter of fact he did not say any such thing.

The Court: Let him answer.

A. No, sir, I did not hear that.

Q. Did you see the pamphlets later, after these men were arrested? A. Yes, sir.

Q. Was it stated by one of the soldiers that these pamphlets were a violation of law? A. Nothing was said at all that I heard.

Q. Were not you directed by Sergeant Silverman to go around and arrest anyone else giving out these pamphlets? A. No, sir, I was not directed by Sergeant Silverman. He asked me and a few others if I would go around in the building and see if there were any people that were distributing these and to come back and tell him, and I went around looking for some people.

Q. And did you go around through the building? A. Yes, sir.

Q. And that was because it was considered that these pamphlets were a violation of law? A. Yes, sir.

Q. Did anyone tell you that the giving out of these pamphlets was not enough to hold these defendants and that you had to have something about not registering or telling people not to register? A. It was enough without telling them not to register.

Q. That is your opinion that that was enough? A. Well, I heard that statement that Kramer made before that.

Q. Did anybody tell you at any time after the arrest, that it was not enough to charge the defendants with giving out these pamphlets, but that you must have testimony? A. No, sir.

Q. That people—or that Kramer told people not to register? A. No, sir.

Q. Was anything discussed like that? A. No, sir.

Q. Between you? A. No, sir.

Q. Did you have any discussion like that with Detective Finan? A. No, sir.

Q. Did you have any discussion with Detective Finan in reference to these pamphlets being legal? A. No, sir.

Q. Did you have any talk between the soldiers at all? A. No, sir, I left.

Q. That the pamphlets were illegal? A. No, sir, I did not go with rest of them.

Q. Did you talk over anything about the pamphlets? A. When we were down in Mr. Content's office, yes, sir.

Q. Not before? A. No, sir.

Q. Then you want this jury to believe that out of 15000 people you happened to just place yourself within three feet of Detective Finan and Mr. Kramer and heard these alleged remarks or conversation? A. I did not happen. I was walking around there and stopped there.

Q. And just happened, out of 15,000 people, to stop behind Detective Finan? A. I don't know how many was there, I could not say.

Q. The Garden was packed from cellar to roof? A. I don't know how many was there.

Q. The Garden was packed, wasn't it? A. Yes, it was packed.

Q. And a big crowd outside? A. I did not see the crowd outside.

Mr. Content: There was not a soul outside.

Q. What time did you get inside? A. About nine o'clock.

WILLIAM J. MORONEY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Moroney, you are a member of the 69th New York Infantry? A. 8th Coast Defense Command.

Q. 8th New York Coast Defense Command, United States National Guard? A. Yes, sir.

Q. That is the same command as Sergeant Silverman? A. Yes, sir.

Q. He is your superior non-commissioned officer? A. Yes.

Q. Did you attend the meeting at Madison Square Garden on the 31st of May, 1917? A. Yes, sir.

Q. Did you see any of these defendants at that meeting? A. Yes, sir.

Q. Which one did you see first? A. Louis Kramer.

Q. Where was he when you first saw him? A. When I first saw Louis Kramer there was a group of them standing together on the second floor and Louis Kramer was giving out circulars in bunches to four or five of them and directing with his hands to go in different places.

Q. You did not hear what he said to the different people? A. He told them to go around and give them out.

Q. You could not hear that? A. Yes, sir.

Q. You are testifying from his gesticulations? A. He was beckoning with his hands.

Q. Now, to all these he was not giving it in single leaflets, he was giving them in bundles, wasn't he? A. Giving them in bundles.

Q. Was the defendant Becker there at that time? Stand up Becker. (Defendant Becker stands up.) A. I could not recognize him.

Q. Stand up Kramer. (Defendant Kramer stands up.) A. I recognize Sternberg.

Q. You recall Kramer as being the man who gave them out? A. Yes, sir.

Q. Who else? A. The man sitting behind him.

Q. Sternberg? A. Sternberg and Walker I recognize, those three.

Q. You refer to these men now? A. Yes, sir.

Q. You are sure of them? A. Yes.

By the Court.

Q. Did I understand that these three people were in one group together? A. There was more than the three.

Q. I mean that these three were among that group? A. Yes, sir.

Q. That is Kramer, Sternberg and Walker? A. Yes.

Q. And at the same time in the same general place? A. At the same general place.

By Mr. Content.

Q. On the next to the top balcony? A. On the second balcony.

Q. And Kramer was the one who was giving out the large bundles? A. Yes, sir.

Q. In other words, Sternberg and Walker were receiving them from Kramer? A. Sternberg and Walker was receiving that stuff from Kramer.

Q. And were receiving their directions that you could only tell by the gesticulations of the hand; is that correst? A. Yes, sir.

Q. Now, you could not hear what was said? A. Yes.

Q. He pointed to different directions? A. Just moved around with the hand.

Q. After that did these people who were receiving the bundles from Kramer leave? A. I seen Kramer give out these circulars, I was within about one

or two feet behind, and I just happened to catch him saying to one man, "Don't register on June 5th."

Q. I didn't hear that. A. Kramer said to one man, "Don't register on June 5th." The answer I could not catch. There was a noise in the hall and everything.

Q. Where were you standing with reference to Kramer? A. I was about two and one-half feet behind him by Sergeant Silverman.

Q. Were you behind Silverman? A. I was behind Silverman.

Q. And he was behind Kramer? A. Yes.

Q. What did you remember of the conversation you heard there? A. Why, that he told these men not to register on June 5th.

Q. Told these men not to register on June 5th? A. That is all I heard.

Q. After that, did Silverman place him under arrest? A. Yes, sir.

Q. After Kramer's arrest, what did you do or hear or see? A. We went downstairs, we turned over Kramer to this detective who came over and said he was a detective and showed his shield and we handed Kramer over to him, I mean Officer Finan.

Q. You didn't know Finan before that? A. No, sir; we went downstairs without Mr. Finan and over into the corner at 26th street, and as we stood there Sternberg was brought in. Then when this big tall fellow came in, Sternberg said in broken English, "How much of the stuff did they get on you?"

By the Court.

Q. To whom did he say that? A. Walker. Sternberg said that to Walker.

By Mr. Content.

Q. Was this the part that you heard them talking about? A. Yes, sir.

Q. Which one started the conversation that you have just related, which one spoke first? A. Sternberg in broken English.

Q. Sternberg spoke to Walker and said what? A. "How much stuff did they get on you?"

Q. What did Walker reply? A. Well, I didn't catch the answer because there was a whole bunch of people in there altogether and I turned around to hold them back.

Q. All you heard was "how much of the stuff did they get on you?" A. Yes, sir.

Q. From Sternberg to Walker? A. Yes, sir.

Q. Now, you have seen defendant——

By the Court.

Q. You said something about you only heard part of a conversation, only part of the talk? A. I did not hear it all as I stood behind the others.

Q. The three men you saw were Kramer, Sternberg and Walker? A. Kramer, Sternberg and Walker.

Q. That is, Sternberg, according to your testimony, when he was brought in asked Walker, "How much did they get on you," or words to that effect? A. Yes, that in broken English.

By Mr. Content.

Q. You did not hear Walker's reply? A. I did not hear his reply.

Q. It was Sternberg that talked to Walker? A. Yes, sir.

Q. That is clear? A. Yes, sir, that is clear.

Cross-examination by Mr. Weinberger.

Q. Did you hear Sternberg say to Walker in English, "How much of the stuff did they get on you"? A. In broken English.

Q. You understand Yiddish? A. No, sir.

Q. You are positive that Sternberg said to Walker "How much of the stuff did they get on you?" A. In English, yes, sir; in broken English.

Q. Whom did you hear Kramer state, "Don't register on June 5th," to? A. Some total stranger to me.

Q. Did you hear him talk or see him talk to Officer Finan? A. No, sir.

Q. How long before his arrest, did you hear him tell someone not to register on June 5th? A. I should judge about three or four seconds; Sergeant Silverman placed him right under arrest.

Q. You did not place him under arrest? A. No, sir, I assisted Sergeant Silverman when he made the remark to him, "Call my friends there will be trouble;" and I took hold of him with Sergeant Silverman and walked him away.

By the Court.

Q. Who made that threat? A. Kramer.

By Mr. Weinberger.

Q. Do you know the name of any man he spoke to at that time? A. No, sir.

Q. You quietly grabbed him with Officer Silverman and took him downstairs? A. Yes, sir.

Q. You could not have gotten the name of the man, could you? A. Well, that would be a hard question to answer, there were so many people up there; it would be a pretty hard place to get to to find out anybody who heard it, because everybody closed right in.

Q. You mean to tell me you could not get the man you saw him talking to if you wanted to, after you had grabbed him? A. If the man had held on to you you probably could have.

Q. Were the people going out at that time? A. They were going out, they were passing out that way all the time.

Q. Was the meeting about over at the time of the arrest? A. No, sir.

Q. People sitting? A. Yes, sir.

Q. The man that Kramer spoke to, was he sitting or standing? A. Standing at the rail on the balcony behind the seats.

Q. Were there other citizens standing behind there? A. Yes, sir.

Q. What was Kramer doing walking up and down and giving out these pamphlets? A. Just started along, to walk away and give out the pamphlets when he spoke to him, to this man.

Q. You didn't see him give out pamphlets at this meeting before that? A. Yes, sir, hand them over their shoulders in that way to various people.

Q. Talking to them? A. Making motions and talking to them, he first handed them over, the circulars, and then spoke to them.

Q. How far away were you when you saw him first? A. About five feet.

Q. And he walked towards you? A. No, I walked towards him.

Q. And did you see the pamphlets that he gave out? A. Yes, sir.

Q. Where did the conversation between Sternberg and Walker take place? A. On the main floor, at the corner of 26th street.

Q. You were all right in one place when they were under arrest? A. What?

Q. You and the prisoners were all right in one place there when they were under arrest and this conversation took place? A. When Kramer was taken to the ground floor by Officer Finan, Silverman and myself, I remained on the ground floor. When Sternberg was brought down and he was placed there and when they brought Walker down there, he was just about two feet from where Sternberg was standing and a whole crowd of people following when they brought Walker in and when he got to Sternberg, Sternberg said in broken English,

"How much of the stuff did they get on you?" And Walker replied while I was pushing the crowd back, and when the crowd broke up I went upstairs on the top floor, the top gallery and came down a little while after, and we took the men up as far as 31st street.

Q. Did you hear Sternberg say to Walker, "Did they hear you tell the people not to register?"

Mr. Content: He has not testified to that or any such testimony.

Mr. Weinberger: I am asking him the question, Mr. Content.

By the Court.

Q. Did you hear that? A. No, sir.

By Mr. Weinberger.

Q. You want this jury to believe that you heard Sternberg in broken English while under arrest all of you right close, right up there close to him, ask Walker, did they find any of the stuff on you? A. Yes, sir.

Redirect examination by Mr. Content.

Q. That is all you heard, just that part of it? A. Just that part of it.

Q. You have not added anything you did not hear? A. No, sir, that is all I heard.

Mr. Content: The Government rests.

THE GOVERNMENT RESTS.

Mr. Weinberger: I move to dismiss the case on behalf of the four defendants on the ground that no case of conspiracy has been proven; the only testimony here is that four men were giving out circulars which is not a

violation of law, and that one of them stated, "Don't register." That is the only charge of conspiracy here, it is in reference to an agreement between four men and others to tell people not to register; but there is no testimony before the Court to show that there was a conspiracy by even these four men here concerned.

The Court: Motion denied.

Mr. Weinberger: I now move on behalf of the defendant Becker that the only testimony here, so far as defendant Becker is concerned, is that he gave out circulars at this meeting, the circulars not being a violation of law, and the charge being in reference to stating, "Don't register," and there is no testimony as far as he is concerned that he was any part of any conspiracy, if there was one.

The Court: Motion denied.

Mr. Weinberger: I respectfully except to your Honor's denial of the motion; and I now make the same motion on behalf of each and every one of the other defendants.

The Court: Motion denied.

Mr. Weinberger: And I respectfully except as to each.

DEFENDANTS' CASE.

(Mr. Weinberger opens to the jury in behalf of the defendants.)

MORRIS BECKER, one of the defendants, called as a witness in his own behalf, testified as follows:

Direct examination by Mr. Weinberger.

Q. Where do you live, Mr. Becker? A. 119 East 102nd street.

Q. Are you the Maurice Becker who drew the picture on that leaflet? A. No, sir.

Q. Did you ever tell any of the officers or the defendants, that you are the Maurice Becker? A. No, sir. I did not say that, and I never have said that to any officer.

Q. Were you in the balcony on the 31st day of May with Kramer, Sternberg and Walker giving out leaflets? A. Never seen those fellows until that evening, and there, and I never seen them in my life before.

Q. Did you go to that meeting to give out Government's Exhibit 1 and Government's Exhibit 2, the leaflets? A. No, only Exhibit 1, I went to give out and I did not give out the other.

Q. When you got to the meeting, what happened? A. Just what happened—I went into the private entrance and as I was supposed to be on the Committee, to give out these here circulars. When I came in, I asked the young girl which I thought would answer the call for the papers, I did not know her, and I asked her where the Arrangement Committee was which will allow me to give out the circulars. She introduced me to one of the men on the floor. I was carrying this little package, about fifty, I don't know how many, announcements, circulars to the meeting.

Q. That is the big circular that just announces the meeting at Hunts Point Palace? A. That is what it was.

Q. That circular? (Indicating.) A. Yes, sir. Now, the gentleman that I was introduced to, said to me at once, "What is this here?" I told him this is a circular what I ask if I can give out at this meeting. He said no, you cannot give it out and give me this package. I gave him that package and I asked when will I get it back. He said everything will be checked in the check room. He never told me that this circular is not allowed to give out by the police. I understood that these circulars is not

allowed to be given out—not to be given out in this meeting. That is the reason that the man gave to me, and I went in.

Q. Did you check these circulars? A. Yes.

Q. Where did you see those circulars again? A. When I went out. First I want to state that when this here man told me—for I knew I was to meet a Committee in this here room, where the Madison Square Committee meets, and he said, "No use to wait here any more, as any man that comes here will be told to go away and that you cannot see your Committee here." Then I went away, I did not see any of my committee that evening. When I went back from the meeting I came over to the check room and I got my package, a little package, which was wrapped in a piece of paper like that, and not covered up any more than that (indicating). And I took my package and when I moved away from the window one of the soldiers came over and he grabbed hold of him with the circulars. They dropped to the ground; I did not do it purposely, but the way he handled me, they fell down and he arrested me. On the way to the police station I never spoke to that man. What he said to me I don't remember. I didn't pay any attention for the reason I did not want to get into an argument, because I understood I have no use. They arrested me down there at whatever they call it, and I have to go with them; and when I come up to one place, 21st street, to one place with them, and I was told then to wait, that I had to go to answer to the police, and that the police would take me in the wagon to another place. And I don't know where, I guess it must have been 57th street. When we got to 57th street, I asked a man, I don't know what he is, one I never saw before sitting in the court. I said to him—he was sitting at a desk and I ask him, "Will you tell me why I was arrested?" That is the first time I spoke, and that man told me—I don't know whether the Sergeant was in there or outside—he told me "You are

arrested because of finding in your possession these here circulars." I didn't say anything—that is what I said to him, I said, "I am surprised that I am, if that is what I am arrested for since this here meeting is advertised in the papers, and I don't think that is quite correct." I did not make any statement, I did not know what it was. If I belonged to the League, I certainly would have told them if they had asked me; and gentlemen, I want to tell you that nobody forced me here to say that, that I belong to the League, there is no evidence that I belong to the League, there is no evidence by anybody that anybody belongs to the League, but I am taking it on myself to say that I belong to the League. But should I be brought here for simply belonging to that League, and I swear I certainly am a member of that League, but I do tell you that I did not give out any of those circulars, and I don't think I will be convicted because I belong to a League because I did not give out any circulars at all that night.

Q. You do belong to the No-Conscription League? A. Yes, sir, I do.

Q. You did not tell anybody at this meeting not to register? A. No, sir, I did not.

Q. You believe in anarchy, do you not? A. I do.

Q. You are an anarchist? A. Yes, sir.

Q. Would you define to this jury what you understand to be anarchy? A. Anarchy to my mind, anarchism is a system of society based on justice, on brotherhood, on equality and not on coercion or force or violence; it is a movement to do away with all kinds of Government, not only organized Government, but Government of one individual by another individual. I am against all force of Government for that reason because Governments rest on force and violence and I am opposed by nature, I am opposed to all force or violence and force, and that is the belief of all anarchists. That is all there is to anarchism, it is a social philosophy.

Q. Do you believe in overthrowing Government by physical force? A. No, sir.

Q. By dynamite? A. No, sir.

Q. By assassination? A. No, sir.

Q. Or any use of force in any respect other than ideas? A. No, I do not believe in overthrowing anything by force; we can get along without any detectives, society can be educated to not need them. It is my main object that I may by force of mental suggestion be able to do away with all government. I am against government. I have influence and I object to that form of force being applied——

By the Court.

Q. See if I understand you correctly: You don't believe in any government, is that correct? A. Yes.

Q. You don't believe, therefore, in the government of the United States, I assume? A. I don't believe in any government. I have no particular reason as to anything against the Government of the United States; I am against all force of any character, and I do not give any particular thought to whether it is the United States Government or any other government.

Q. I mean in your belief against governments, you include the United States? A. I include all governments.

Q. Cannot you answer that? That is a very simple question? A. I include all governments, and naturally the United States Government.

Q. Do you believe in obeying the laws? A. Well, not a law that is based on a violation of my principles and on the use of force.

Q. So that if the law is not satisfactory to you, you believe you needn't obey it? A. If the law is not satisfactory to me.

Q. If you do not think the law is as it should be, you think you can disobey it? A. Yes, if any law is against my absolute thought, my character or anything, I can disobey such a law.

Q. You believe in disobeying so-called registration law? A. May I ask what is meant by the word "disobey"?

Q. Refusing to comply with its provisions. A. If I am to——

Q. You are an intelligent man. Answer yes or no. A. I will answer if I was asked, of course, but I asked you—I don't care whether it was a law made by any man, but if it is a law that is absolutely against my nature, which required me to kill—and I will not kill—I rather die, I rather be shot myself than take a gun and go and kill anybody else, and I don't care who made that law, whether by one individual or by 100 individuals——

Q. You belong you tell us to the No-Conscription League? A. Yes, sir.

Q. That, I assume, has some doctrines or principles, hasn't it? Is that correct? A. Well, the League has no principles outside, that is, it is opposed to murder, that is, they are conscientious objectors and conscientious even to the point of death.

Q. Do you know that there was a law passed that became effective on the 18th day of May, 1916, requiring, among other things male persons between the ages of twenty-one and thirty-one to register; did you know that? A. I know that, I have heard of it.

Q. That is an easily answered question. Do you know that such a law or laws were passed, and if you knew such a law was passed, would you obey it or not? A. That means I should join the army?

Q. No, that means that you should register. A. Register? Yes, I know that.

Q. You know that? A. Yes.

Q. Is that one of the laws that you do not believe in? A. Yes.

Q. That is? A. Yes, sir.

Q. Is that one of the laws that you think you are at liberty to disobey? A. Yes, I think so.

Q. You do think so? And is that one of the laws in regard to which you think you have a right to ask other people to disobey? A. Well, I do, yes; whether I have a right——

Q. Is that one of the laws that you think you have a right to advise others to disobey? A. What I want to ask, what right is referred to? There are various definitions of right, I don't know what right is referred to.

Q. I am using the word in a very simple and popular use. Is that one of the laws that you think you are privileged to advise other people to disobey?

Mr. Weinberger: With all due respect to the Court I must object to the form of the Court's question.

The Court: You may make your objection; it is overruled; and you may have an exception.

Q. Will you answer the question, please? A. I say that it is my natural right, and so I feel that I shall not kill.

Q. I am not asking you what you did, Mr. Becker, I am asking you, as you have been asked in response to questions of your counsel and as you informed us of your views, I am asking whether if part of your views is that you are privileged to tell other people not to obey the law recently passed requiring registration as preliminary to the selection of people for the army? A. Yes, I think I do.

Q. You think you have that privilege? A. Yes.

Q. And if I understand you correctly you think that you have the privilege to advise other people to obey no law which you think is not right? A. I am only concerned about the law which directs to take human life, and if that is the law I say I will go against any law and will agitate against any law if it is about taking life. I am opposed to taking life, and I will say to any man or any individual

that this law is higher than any other law on earth though man made.

Q. I understand. Your idea is that your own idea about it is higher than the law that the Government has laid down? A. You mean the law about——

Q. About registration? A. No, I have not said anything about registration. I will not obey the law to take up arms to kill any man and I say this law is higher than any other law and it makes no difference as to it whether the law is made by men in Russia it will——

Q. Will you please answer my question? You think, and you have told us, that you knew that there was a law passed requiring that certain male persons should register. You understand that, don't you? A. Yes.

Q. And you knew that that law was a part of a plan by which ultimately a certain number of men should be selected for service in the army and navy. You understood that? A. Yes.

Q. And you disbelieved in both those laws, is that correct? A. Yes.

Q. And, as I understand you, you feel at liberty to, and have felt at liberty—I am not saying what you did—but you do feel at liberty to advise any person not to obey it?

Mr. Weinberger: Might I respectfully object to your Honor's question in that form?

The Court: Certainly. You may have an objection and the objection is overruled; and you may have an exception.

Q. Do you understand my question? Read it to him, Mr. Kidder. (Question read by Reporter). Is that right? A. Yes.

The Court: You may go on.

By Mr. Weinberger.

Q. Have you told anyone not to register? A. No, I did not.

Q. On the 31st day of May, did you tell anyone not to register? A. That was the meeting?

Q. Yes. A. No, I did not, I did not say so to anybody.

Q. Did you have any agreement with anyone to go around telling people not to register? A. I had no agreement with anybody. I did not see anybody there.

Q. You sat down and listened to the speeches of the meeting? A. Yes, sir.

Q. And on your way out you went to get your package? A. Yes, sir.

Q. You admit, of course, that you went to this meeting pursuant to an agreement of a Committee of the No-Conscription League to give out Exhibit 1 (showing paper to witness)? A. Yes.

Q. And someone else was going to give out Exhibit 2? A. I don't know anything about anyone was to give out those. I had those there simply and only to advertise the meeting; and we had first the permission—I want to say to the gentlemen—therefore, I say, I would go there and give it out in the committee, as I understood they were to meet there, because they have other men inside to do with that, and I was to give them out outside. When I inquired for the committee the man said anyone coming there they would be told to go away, and then I was told that I was to check my bundle, which I did and went inside and listened to the speeches. And when I had gone inside and listened to the speeches and I came out and I got my bundle or package at the check room, and I did nothing that was illegal and nothing that should have been so considered.

Q. The mere fact that you believe that we can get along without government, or that you believe

that no man or government has a right to make you kill, has not led you to tell people to refuse to register? A. Not on that occasion. I have not spoken to anybody.

Q. Or at any other occasions before the 31st day of May? A. I have not spoken on that occasion, but I have certainly spoken to my friends and I certainly would consider myself a criminal if I would not tell them that it is a most unhuman thing to kill and they should not kill. I do say that and I do not appeal to anyone as to what I can speak about either.

Q. Mr. Becker, it is not whether you told your friends in discussion not to kill, but, of course, the Bible says the same thing, and the question is as old as the world——

> Mr. Content: Does he believe in the Bible?
>
> Mr. Weinberger: There are certain truths in the Bible that we believe, that are found in the Bible.

Q. Did you tell anyone to refuse to register? A. Not that evening, no.

Q. Or any time before that? A. No.

Q. Did you have any agreement with anybody? A. No, not at all.

Q. Did anyone there—or with anyone there to tell others not to register? A. Not at all.

Q. The only agreement you had is with your committee, to give out people's Exhibit No. 1? A. To advertise the meeting.

Q. And you did advertise the meeting? A. Yes, sir.

Q. And you did believe in Government's Exhibit No. 2; is that a correct statement of your principles? A. If I did believe in what?

Q. In Exhibit 2, the language, that is the statement of the No-Conscription League? A. If I do believe in it?

Q. Yes. A. Yes, I do believe in it.

Q. That it is improper to kill? A. Yes, sir.

Q. And that no Government has a right to make you kill? A. Certainly.

Q. And that no Government has a right to force you into the army to make you kill? A. Certainly; that is my belief.

Q. You do not believe in any killing? A. No, sir.

Q. You do not believe in any government, that it has a right to make you go and kill anyone? A. No, sir.

Q. And that is the reason you joined the No-Conscription League? A. Yes, sir.

Q. That is the reason you had appeared there at that meeting? A. Yes, sir.

Q. And that is the reason why up to the present time you do not fight in any army? A. I would not fight in any army, that is the reason. Might I state here, that I have nothing to do with any Pacifists, and that while a Pacifist has some principles that are the same, some of their principles are against those that I believe in; and I am against any law that will make this country enter into the war, chiefly, whether directly or indirectly, or that will make any country enter into any war and I am opposed to them because they believe in force; and it doesn't make any difference to me whether the United States is right or wrong, in principle, this is something that I have nothing to with, this Pacifist movement, because the questions are altogether different. In connection with their principles they believe in force to a certain extent, but we do not believe in force. I am not in sympathy with this Pacifist movement in that regard.

Q. Now, in your statement of your position, did you tell any officer or guardsman that you did not know what you were giving out at that meeting or what you had in that pamphlet? A. I certainly did not say that.

Q. Had you given out those circulars at any other meeting at any other place, Government's Exhibit

1? A. I had no occasion yet to give them out, so I did not.

Q. You did not give any out at Madison Square Garden? A. No, certainly not.

Q. And you are positive that you did not tell these officers who arrested you, that you did not know what was inside that leaflet? A. I did not see that officer before, I stated that plainly, that I never seen that officer or ever spoke to him.

Q. You did not tell whoever it was that arrested you, that you did not know what was stated in that leaflet? A. No, I did not.

The Court: Is officer Henry here?

(An officer comes forward.)

By the Court.

Q. Did you ever see this officer? A. That is the man who arrested me.

Q. What officer is it that you mean you did not see? A. I mean the man that told me that I had told him that I drew that cartoon.

By Mr. Weinberger.

Q. Officer Finan? A. Yes.

Q. You never told Officer Finan you were Maurice Becker? A. Never. How can I say it? I am not him.

Q. You never told Officer Finan you were Maurice Becker? A. Never. How can I say it? I am not him.

Q. You know Maurice Becker? A. Yes, sir.

Cross-examination by Mr. Content.

Q. How old are you? A. 32.

Q. You stated that you lived in 119 East 102nd street? A. Yes, sir.

Q. And is that correct? A. Yes, sir.

Q. You were asked that same question before the

United States Commissioner, were you not? A. Yes, sir.

Q. And you refused to answer, didn't you? A. Yes, sir.

Q. Why?

Mr. Weinberger: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled, it goes towards giving us a consecutive picture.

Mr. Content: This is his previous testimony.

Q. Why did you decline to answer? A. I did not give any evidence, I did not want to disturb my people at that meeting, but after, I changed my mind, and I gave my address.

Q. Where were you born? A. In Russia.

Q. Are you a citizen of the United States? A. No, sir.

Q. You were asked this question by me before the United States Commissioner: "Q. Are you an American citizen? A. I refuse to answer." Did you answer that to me then?

Mr. Weinberger: That is objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Did I say I refused to answer?

Q. I am reading the question and answer, and if I read it incorrectly you tell me. This is a question by me: "Q. Are you an American citizen? A. I refuse to answer?" A. I refused to answer all questions. Not only this question but all questions, and when I come to answer that question, I answered, "I am a citizen of the world."

Q. And I asked you whether you were an American citizen, and you stated, "I am a citizen of the world." A. I am a citizen of the world.

Q. You have never taken out citizenship papers, have you? A. No, I do not believe in taking out any citizenship papers.

Q. When did you come to the United States? A. Eleven or twelve years ago.

Q. What year? A. Well, I think it must have been 1906.

Q. What month? A. I cannot tell you that.

Q. What season of the year was it, Winter or Spring or Fall?

Mr. Weinberger: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Weinberger: Exception.

A. That was, I guess on the beginning of Spring.

Q. In the beginning of the Spring? A. Yes.

Q. What ship did you come on? A. I don't remember.

Q. Don't remember that? A. No.

Q. Were you an anarchist when you entered the United States? A. I was an anarchist when I entered the United States.

Q. You were? A. Yes, sir.

Q. You have no interest in the Government of the United States? A. I have no interest in the Government.

Q. You don't owe any allegiance to the United States?

Mr. Weinberger: I object on the ground that it is incompetent, irrelevant and immaterial.

Mr. Content: I don't think that is so. Mr. Weinberger asked a lot of questions on this subject.

The Court: In view of the direct, I will allow the questioning.

A. I don't know what is meant by "allegiance."

Q. Don't you know what "allegiance" means? A.

No, I want to understand what is meant by the word "allegiance."

Q. You don't feel that you owe any obligations of any sort to the Government of the United States, do you? A. I owe no obligation to anybody.

Q. Do you feel that you owe any obligation of any sort to the Government of the United States? A. I said that I did not feel I owed any obligation to anybody.

Q. Does that include the Government of the United States? A. Counsellor, that is a question of conscience, if you will tell me now if that is a——

Q. You are an intelligent man, Mr. Becker, and you can answer that question? A. There is no distinction, now, there are many things that are good in the United States and in other countries and in the laws of the countries I suppose, but as I said before I am a citizen of the world and have no allegiance to this any more than to any other Government, and when it comes down to that it is a question of conscience, and I do not accept anything that is against my conscience.

Q. You place yourself above the laws of the United States, don't you? A. What do you mean by "above the laws?"

Q. You feel that your conscience is higher than the laws, don't you? A. I feel that I have nothing to do with the laws. If it is a question of conscience, I would not kill if I have to be put to death, I do not do anything of that kind, it is entirely against any law of my nature.

Q. You belong to the No-Conscription League? A. Yes, sir.

Q. When did you join that? A. Well, I cannot tell that.

Q. Why? A. I don't care to answer this question.

Q. Why don't you care to answer this question? A. It has nothing to do with this case, when that date was.

Q. I asked you when you joined the No-Conscription League and you said you were a member, this is on your direct examination to Mr. Weinberger, you said that to him on direct examination, volunteered it. Now, on your cross-examination, I ask you now when you joined it? A. The time when the law, or when the beginning was about conscription.

Q. When was that, about? A. Well, probably a couple of months ago.

Q. A couple of months ago? A. Yes, sir.

Q. Isn't it the purpose of the No-Conscription League, of which you are confessedly a member, to resist conscription by all means in your power? A. Yes, sir.

Q. And isn't it the purpose of the No-Conscription League to give aid to and succor people who come into conflict with the Government of the United States? A. To do what?

Q. Isn't it the purpose of the No-Conscription League to give assistance to people who come in conflict with the Government through the enforcement of the law? A. Yes, that is stated on that circular plainly.

By the Court.

Q. What is your occupation, by the way? A. Ladies' hats.

Q. How long have you been in that business? A. Since I am in this country.

Q. Were you employed at the time of your arrest? A. No.

Q. How long since you have been employed? A. A couple of weeks.

Q. A couple of weeks, and that is all? A. Yes.

Q. And with whom were you employed? A. Kirschfeld & Sons.

Q. How long have you been employed by them? A. Well, I was employed—that is a season work, and I was employed one season and then another season and then another season.

Q. Cannot you answer my question? A. That is all that I have been employed. I am working on a season work and a season work, when the season is over, stops, and I have nothing to do; if the work of that season is bad, then we have to stop work; but for these people I was working several seasons, for these men.

Q. How many seasons have you worked for Kirschfeld Brothers? A. Probably four or five seasons.

Q. Whom did you work for before that? A. I cannot tell just now. I really have worked for so many men I cannot remember, as it is season work and each man works that season and then is an end, and again he may work for the same man or another man the next season. I work until the season is finished and then I have nothing to do, or else I work for another man whose season perhaps is longer or is just commencing. Each line of work has a different sort of apparatus and some require the work of some men all the time, but the greatest part of them are only working part of the time. I work for this man one time and another man another time, so I really cannot tell who they are.

Q. How many different persons have you worked for since you have been in this country? A. Oh, I could not tell you that.

Q. A dozen? A. A great many, I think more than a dozen.

Q. More than a dozen? A. Yes.

Q. Two dozen? A. Well, about.

Q. Well, then, as I understand it, you have been here then about eleven years and worked at about two dozen different places; is that right? A. I want to emphasize that we have nothing to do with looking for a job. When our season finishes, we go to the union and the next season, why, I get a place, even if I want to go to the same manufacturer, I cannot do so, whether I want to or not I have to go where there is an opening. They do not ask us those

questions, and wherever there is a vacancy, they place us in them.

By Mr. Content.

Q. Now, Mr. Becker, you gave to Mr. Weinberger on direct examination a rather elaborate explanation of how you went to the Garden with the idea of distributing leaflets, and you understood you were not supposed to give out any leaflets in the meeting, and that you talked this thing over on the outside. You remember your testimony on your direct examination, don't you?

Mr. Weinberger: Ask him a question.

Q. You remember the testimony that you gave Mr. Weinberger about checking your bundle; you remember that, don't you? A. If I remember?

Q. You remember about checking it, don't you, you know what I am talking about? A. (No answer.)

Q. Look here: On direct examination you told Mr. Weinberger how you went over this proposition and about your being on the committee to give out these things? A. Yes.

Q. And then why you did not give them out? A. Yes, sir.

Q. You remember Mr. Weinberger asked you those questions and you stated that to him? A. Yes, sir.

Q. You were a witness before the United States Commissioner, weren't you, before Commissioner Hitchcock? A. Yes, sir.

Q. Let me ask you this: That the first time you ever mentioned about checking your bundle was here today, wasn't it? A. Well, I was not asked. I was asked a couple of questions, and there was no going into my case at all in there.

By the Court.

Q. Now, you say that you went down there as a member of a committee. A. Committee of the No-Conscription League? A. Of the No-Conscription League.

Q. And were any of these co-defendants on that committee? A. Only one.

Q. That was whom? A. Kramer.

Q. Mr. Kramer? A. But I did not see him there.

Q. But he was a memeber of the committee? A. Yes, he was a member of the committee.

Q. You got some sort of instructions from some place to go down there, didn't you? A. Yes.

Q. Where did you get those instructions? A. This I could not tell.

Q. I am asking you? A. I agreed with the committee that outside we should give out these circulars after the meeeting; they made a commotion——

Q. Who agreed to that? A. The committee.

Q. Who is on the committee? A. On the committee? Why, a few fellows, not the ones that are here, only Kramer, and I never seen him there, and the other fellows I never seen in my life.

Q. Kramer and some other people? A. Yes.

Q. You agreed that you would give out circulars at this meeting at the Garden? A. To advertise the meeting.

Q. The circulars that you speak of as advertising the meeting are Government's Exhibit 1, that big one? A. Yes, sir.

Q. This Government's Exhibit 1. Had you ever seen that before that night? A. I had seen it.

Q. Where had you seen it? A. I did see it up at the No-Conscription League.

Q. Where is that? A. I cannot say what the place is.

Q. You will have to answer my question. Where is it?

Mr. Content: The address is right on here.

A. That is the place.

Q. Where? A. Where the circular comes from, where the address is.

Q. What is the address? You know, you have been there, you say? A. The address is 20 East 125th street.

Q. How long before the Garden meeting did you have an agreement with Kramer and the other members of the Committee to give out circulars? A. A few days.

Q. How long before the meeting was Exhibit No. 2 printed, that is this paper (handing same to witness)? A. This I cannot tell.

Q. How long before the meeting did you see Exhibit No. 2? A. I seen them quite a long time.

Q. Quite a long time. Did you see it at the meeting at which you agreed to give out circulars in the Garden if permitted? A. Well, never—I did not see to that meeting any of the circulars; we were only to give them—you see when we got to the meeting——

Q. Where did you first see Exhibit No. 2, more circulars like it? A. I told you I seen it a long time ago.

Q. Before the Garden meeting, didn't you? A. Yes.

Q. Where did you see them? A. In the same place.

Q. Same place? A. Yes.

Q. Now, where had you been before you went to the Garden that night? A. Where I had been?

Q. Yes. A. Home. I went from my home.

Q. What circulars did you take with you? A. The big circulars—the advertisement circular.

Q. Did you take that Exhibit 2 with you? A. No. I had a few in my pocket, they were a few of them there in my pocket.

Q. When you went to the Garden meeting, you had a few of Exhibit No. 2 in your pocket, as I understand you? A. Yes.

Q. How many did you have? A. I don't remember the number, about ten or fifteen I had in my pocket.

Q. What pocket? A. This pocket (indicating).

Q. Your inside pocket? A. Yes.

Q. When you got to the Garden meeting, what did you do with these No. 2 circulars? A. I didn't do anything with them; I didn't even remember that I had any when I came to the place where I was arrested, not until I came to the place where I was searched, where they searched my pocket, then they took them out with all my papers, they took a few of these; there was plain papers, newspapers and pamphlets and this here.

Q. How many numbers in all did you have of this big circular? A. Well, I cannot tell, probably fifty or one hundred, I cannot tell, I did not count them; I had just a little bundle, you see, and I was to have it to give it to the committee.

Q. Whom did you give those numbers to? A. I checked them.

Q. Where did you get them from? A. I got them from a friend of mine?

Q. What is the name? A. The name? I cannot tell you the friend's name.

Q. You mean you won't tell? A. No.

Q. Well, you must tell. A. I must not.

Q. You refuse to tell? A. I refuse to tell; I won't tell on anybody that might get into any trouble from me, as I was supposed to bring up the circulars, I was supposed to bring them along to the meeting and show them.

Q. Your friend prepared these circulars, did he not? A. Yes, certainly.

Q. When did he bring them there? A. I did not ask him when he brought them up, he gave to me, that is what I was to be present for to do with them in the Madison Square Garden.

Q. Answer my question and don't go on with such a lot of things that are not in answer to my

question. Where did your friend give you these circulars? A. In my home.

Q. In your home? A. Yes, sir.

Q. And you thought there was about fifty of them, did you? A. About fifty circulars.

Q. Fifty circulars? A. I don't know; fifty or a hundred, that is a small bundle of them, I don't know how many there are in the bundle.

Q. You estimated them? A. How many there are I don't know because it is thin paper, I don't know how many there are.

Q. You guessed that the bundle had how many, fifty or one hundred, from fifty to one hundred? A. Yes.

Q. That is the small bundle? A. That is the bundle that I was to take up there.

Q. Did you look through the bundle to see what was in it? A. Did I look through the bundle? I did look through the bundle.

Q. You looked all through it? A. Only the big circulars.

Q. Did you look all through the bundle? A. Yes.

Q. You looked over every single one? A. I didn't look over every circular. I opened it up but I read the last one, the last line is here, and when I see what it was I went to Madison Square Garden with them to meet the committee and to see if I could give the circulars out.

Q. When you got to Madison Square Garden whom did you see? A. When I got to Madison Square Garden there was a great crowd there and I could not get in.

Q. You could not get into the Garden? A. I got into a private entrance, the only way I could do was to get on the floor that way, and I did not know which way to go as I was headed for this room, to attend this meeting of this Committee where our men were to be. The place was so big I did not know where to go and so I asked the girl where can I see the Committee. She pointed, she took me

along, and brought me over to a man that was in the room, and I was supposed to go, and I told him, to the committee's room and to meet my committee there and he told me there was nobody there, there would be nobody there, and there would be no committee meeting and nobody will get to it; because we won't allow you to give out any circulars. He took them that I had away from me and stated——

Q. Who took them away? A. The man on the floor. I said, "Why do you take them away, take away the stuff from me?" He said, "All right, I know what I am doing, you will get them back when you go home."

Q. So when the soldiers came around where you were you had the circulars, except these that were in your pocket? A. The soldiers who arrested me?

Q. Yes. A. When they arrested me?

Q. When they arrested you. A. When they took them out of my pocket, these circulars.

Q. The soldier arrested you just as you were taking out your circulars from this place where you checked them with this red haired girl, did you say she was red haired? A. No. She took me over to that man, she called over this man and he took away from me my bundle, and after I came back he gave me back my bundle—not the same man, I did not see the same man again.

Q. What kind of a check did he give you? A. I didn't get any check. He said I don't need any check, you can get it very easily when you come back here, you can get your bundle, that is how everybody did.

Q. It is just as you came down from this check room that the soldier arrested you, come up to you and arrested you, was that it? A. Yes.

Q. What had you been doing in the Garden after you got inside? A. I was sitting, listening to the speeches.

Q. Whereabouts? A. I was on one side of the balcony, I cannot tell what side it was, what seat it

was, because I don't know where I sit as compared to the streets, but I was right in back of the speakers; here are the speakers (illustrating).

Q. Had you seen Kramer that evening? A. I did not.

Q. When had you seen Kramer last? A. Last, a few days ago.

Q. I mean before that meeting? A. Before that meeting I seen him a few days ago.

Q. At that meeting at which you and Kramer were both present it was agreed to distribute circulars at the Garden meeting? A. It was agreed on condition that we first to call a committee and anybody who might come to the meeting we were to have them give out these; we wanted to get our permission to give these circulars out, and then we would give them out on the floor and it was agreed that they should meet there in that particular room, the committee room of the Garden and from there we were to go with the circulars, but they did not allow us to meet in that room, so we did not meet there and there was no agreement of the committee other than that. We were to meet there and the circulars were to be divided up and then we were to go and give them out.

Q. You were to divide up the circulars? A. Yes. They did not give us any permission, and I don't know whether or not anybody went out to give any out, I did not see them do so.

Q. There was an agreement between you and Kramer and these other people that if you got the permission of the people running the Madison Square Garden, that you could distribute circulars? A. Yes, sir.

Q. Was there any agreement as to what room you were to go to there? A. There was no agreement as to that.

Q. Or as to what hour you were to get there? A. No agreement as to the hour. Each one worked under the direction of the committee and we were

to meet the committee there and they were to come into that room and get directions.

Q. That is, who was going to meet? A. The committee was going to meet in this meeting room.

Q. Your committee? A. My committee was going to meet when the meeting starts.

Q. You had an agreement with that committee that you were to meet in Madison Square Garden? A. Yes, sir, we were.

Q. And you would find the other members of the committee and the committee in charge of the Madison Square Garden? A. Yes.

Q. So that the agreement that the committee made was that you and Kramer and the other people were to go down there and meet together, the several of you. You understand me? A. Yes.

Q. How many were there on that committee besides Kramer? A. Oh, about eight.

Q. And there was a committee of ten altogether, or eight or six, which was it? A. No, eight altogether.

Q. That is, there were the six of them besides you and Kramer? A. I did not see Kramer even; and this committee affair that was supposed to go along and as we had agreed upon, did not meet, because we could not have this meeting room and I could not bring in my circulars that I had agreed to bring in there as my part of it, and so I did not see Kramer and I did not go on with the thing as we had agreed to.

By Mr. Content.

Q. I would like to ask one more question: You say that you have—it was your intention to give out the large circulars, Government's Exhibit 1? A. Yes, sir.

Q. Was it your intention to give out any of these Government's Exhibit 2? A. No, not that one.

Q. You had them in your pocket, they had already been prepared, hadn't they? A. I beg your

pardon. I did not have them in my pocket only a few of them, and I did not take them along in my pocket knowingly, but when my papers was taken out and I was charged with this, they took those out too because they found them in my pocket. I did not know that I had them.

Q. I call your attention to the fact that in the bundle of papers that have been placed in evidence here there are a considerable number of this Exhibit No. 2 that have been found, there were a number of this Exhibit No. 2. A. I beg your pardon. It could not have been in there at that time, because it was a plain small little bundle, and it had been in my pocket, among my papers a long time and I had them in my pocket squeezed up for a long time.

Mr. Weinberger: That bundle was not rolled, was it?

Mr. Content: No, not rolled, I rolled it up.

Redirect examination by Mr. Weinberger.

Q. Your bundle was flat, wasn't it? A. Yes, sir.

Q. So it could be put away in a small place, these are small circulars, I take it? A. Certainly, I had a small, a little bundle of them.

Q. Did you know either Walker or Sternberg before they were arrested that night? A. I never seen them.

Q. Were they on any committee? A. No.

Q. That you knew of? A. No, sir.

Q. Were they members of the No-Conscription League? A. No.

Q. Did they ever attend any of your meetings that you know of? A. No.

Q. Do you know if Mr. Kramer had been given out as being one of the committee, you knew that? A. Yes, I knew that.

Q. You knew he was going to give out circulars? A. Yes, sir.

Q. Was there any instructions or anything said that your committee should hold a committee meeting of the No-Conscription League and to be instructed about telling the people at Madison Square Garden not to register? A. No.

Q. Did you ever tell anybody on any other occasion not to register? A. No.

Q. Any individual or in any speech? A. No, we had distinctly no such thing. We went to the Garden and were going to hold our meeting when we could get there, those of the committee that could come. We held several meetings at which volunteers were asked for and urged to come, and we told them to come to this committee several times the matter was discussed and as anarchists, we did not say to anybody what they shall do. I would not direct, but I would urge that they do what we wished done. That is also a principle of our propoganda that it is done by the committees, who are independent, and we do not say directly to them that they must do so and so.

Q. It is a general thing, right in your propoganda, to state what you believe? A. Yes, sir.

Q. And then the other fellow can do as he pleases? A. Yes.

Q. But there was no agreement at any time was there, between you and Kramer or anybody else, to tell people not to register? A. Nothing.

JOSEPH WALKER, one of the defendants, called as a witness in behalf of the defendants, being first duly sworn testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Walker, are you a member of the No-Conscription League? A. No, sir, I am not.

Q. Are you an anarchist? A. No, sir.

Q. Do you belong to a labor union? A. The Printers' Union.

Q. What labor union do you belong to? A. The International Printing Pressmen's Union.

Q. What name? A. The International Printing Pressmen's Union of North America.

Q. How long have you been a member of that labor union? A. About 18 years.

Q. Did you have any agreement with anybody on the 31st day of May, to give out—before you went to the meeting? A. I did not.

Q. To give out circulars? A. I did not.

Q. Did you have any agreement or any arrangement with anybody on the 31st day of May to tell people not to register? A. I did not.

Q. Did you know either Kramer or Mr. Becker before you went to that meeting? A. I did not know them.

Q. Had you ever seen them before? A. No, sir.

Q. Had you ever served on any committee that he was on? A. No, sir.

Q. That you know of? A. No, sir.

Q. Are you of conscription age? A. I am.

Q. Have you served in the United States Army? A. Yes, I was in the United States Army.

Q. The Army? A. I was in the United States Transport *Kilpatrick*, and I was on the United States Gunboat *Crook* in San Francisco. I was in the *Kilpatrick* in New York, which sailed from New York to Port-au-Prince.

Q. Are you opposed to the Conscription Law? A. Should the United States get in difficulties and they need men, I would be willing to go.

Q. I mean, have you any feeling now against the law? A. Absolutely none.

Q. Or against registration? A. Positively not, no.

Q. Have you taken part in any No-Conscription meetings? A. Not with the exception of the one at the Garden.

Q. That was not a No-Conscription meeting except they spoke about conscription? A. No.

Q. Have you ever advised anybody not to register? A. No, sir.

Q. Were you part of any committee as far as you know to advise people not to register? A. No, sir.

Q. When you were arrested, did you have any circulars, either Government's Exhibit 1 or 2? A. Well, I had a bundle, but I really didn't know what it contained; that was what I got at the meeting; this man was handing them out and he handed them to me and I looked at them, it was the blank side of them that was turned towards me, and I turned it upside down from what it was when I received it.

Q. Did you know Sternberg before the meeting? A. Never seen him.

Q. At what time of the evening did you get the pamphlets or leaflets? A. Well, I came from work at six and I got into the Garden at 8.30. I got in the front about nine o'clock, I suppose, and I went upstairs and sat down and when I got pulled, I came downstairs on my way out, I got to the one flight up above the ground floor and I saw a bundle of these leaflets which was inserted in my hand by somebody and the instant that they were inserted there I was seized right away, immediately.

Q. Did you give out any of the leaflets to anyone? A. I don't know what I did. There was lots of them loose, and there was some grabbing, and they started to spill.

By the Court.

Q. What condition were they in? A. The leaflets were loose. They started to spill when they were handed to me to give out, but I didn't issue one of them.

By Mr. Weinberger.

Q. When you were arrested did Sternberg say to you when he was brought up: "Did they get any

of the stuff on you"? A. No, Sternberg cannot express himself in the English language.

Q. Did he speak to you in English at any time? A. Not to my recollection.

Q. Did you say to him, "Yes, they got the stuff I had, did they get it on you?" A. No.

Q. Did you say to him, "Did they hear you tell people not to register"? A. Did he say to me, Mr. Weinberger?

Q. Yes, or did you say it to him? A. No, sir.

Q. Was any expression like that used at all? A. Not a bit.

Q. Between you two? A. No, it was.

Q. Or between Kramer and you? A. No.

Q. Or anybody else? A. Of course, the pamphlets which were issued——

Q. I say, was anything said between you and Sternberg? A. No.

Q. About "Did they hear you tell people not to register" and you said "Why, they must have heard because there is a lot of detectives around"? A. No, sir.

Q. And did he say to you, reversing it around? A. No, sir.

Q. Did you talk to him in English at any time? A. I tried to converse with him in English, but he could not seem to understand me.

Q. You talk Yiddish yourself? A. Very, very little.

Q. Do you understand Yiddish? A. I understand it better than I speak it.

Q. While you have been in jail, while you were both under arrest, before you were arrested either, he did not talk English to you? A. In jail?

Q. Yes, in jail? A. Well, he makes himself understood a little bit in English in jail.

Q. Did you go to this meeting at Madison Square Garden by yourself? A. I did, with the intention of hearing Hillquit.

Q. Did you make any arrangement with anybody to meet you there? A. Yes, sir, appointed upstairs but I lost him.

By the Court.

Q. You said something—I may have misunderstood you—that you had an armful of these sheets of papers given you by Kramer? A. No.

Q. What was that? A. That was these things, that is, these leaflets.

Q. You mean Kramer gave these to you? A. Yes, sir.

Q. When and where? A. At Madison Square Garden.

By Mr. Weinberger.

Q. At any time at that meeting were you, Sternberg or Kramer and Becker together up in the balcony? A. Only once up in that gallery when I first came downstairs, it was Kramer that I met, was the only one.

Q. Downstairs where? A. The floor, one flight above the ground floor.

Q. At any time were you up over the balcony, one from the roof, with Sternberg, Becker and Kramer? A. At what time?

Q. Were you all there? A. No, only Kramer and I; that is where I came and met him and had a conversation with him on that one balcony.

Q. And Kramer did not give you any leaflets and say where you should go with them, did he? A. He issued them to me. He didn't tell me where or what to do with them; I was taking them away at the time and was going to give them out when I got downstairs.

Q. On your way down? A. When I got downstairs.

Q. You were on your way out of the building at the time? A. I was on my way coming down when

the pamphlets was issued to me by Kramer. I was right at the head of the stairs there, and I was on my way out.

Q. At the end of the meeting? A. No, it was not at the end of the meeting; Hillquit was speaking at the time.

Q. Where were you? A. Right at the head of the stairs.

Q. At the time when you were going out of the building? A. I started to go out.

Q. Had you had any arrangement with Kramer to meet him there? A. No arrangement.

Q. Or to give out pamphlets? A. No.

Q. And did you talk to him and did he issue to you and show you what to do with these pamphlets? A. When I first met Kramer I seen the pamphlets issued to another fellow, and he was giving them to us, and I walked up there, I wanted to get one of those pamphlets off Kramer.

Q. So if the officer states and some of the soldiers that you, Sternberg, Kramer and Becker were up in that gallery and each one getting bundle and Kramer pointing where you should go with them, that is not true? A. That is not true because when I met Kramer, Kramer—Becker was not with Kramer when I met him.

Q. Nor was Sternberg? A. Nor was Sternberg.

Cross-examination by Mr. Content.

Q Now, Mr. Walker, you say that the pamphlets that were taken from your possession by Mr. Henry —you know who I mean? A. Yes, sir.

Q. Were given to you by Kramer; is that correct? A. Yes, sir, they were given to me by Kramer and the Commissioner, I didn't——

Q. Wait a moment, wait a moment. Will you answer my question, please? Were they given to you by Kramer? A. Given to me by Kramer.

Q. I call your attention to this conversation: "Do you know the man you obtained them from," referring to the leaflets. "A. In fact, I could not very well." Did you make that answer to that question? A. Not to me in there I did not.

Q. This is cross-examination by me. A. In here?

Q. Before the Commissioner, Commissioner Hitchcock? A. Oh, I said that before the Commissioner and what I meant——

Q. Listen to my question and answer whether you made that answer that way or not, that is all I ask? A. Yes, sir, I said that to him.

Q. Will you listen to what I say?

Mr. Weinberger: Please wait.

Q. Wait and listen to this. I will read it to you again. Did you make this answer to this question: "Q. Did you know that man you obtained them from? A. In fact I could not very well." Did you say that? Yes or no. A. Yes, I said to that fellow when there was two of them——

Q. Did you say that? A. Yes.

Q. "Q. Do you know him? A. Not personally, no." A. The other fellow I didn't know.

Q. Will you please see here a minute and listen? Did you make that answer to that question? A. To that effect I did, yes, sir.

Q. "Q. Did you ever see him before? A. No; I don't recall his face at the present moment." Did you make that answer to that question? A. Yes, sir.

Q. "You say this man thrust them on you? A. Yes." Did you make that answer? A. That was the other fellow, yes; he threw some in my hand too.

Q. Before the Commissioner when you were asked where you obtained the pamphlets from, you didn't say Kramer, did you? A. No, but I received some from another fellow, from the other fellow there.

Q. But you say now before this Court that you received the pamphlets from Kramer, do you? A. Yes, those are the ones I received, yes, sir.

Q. You said, I asked you the very first question, whether the pamphlets taken from you by Henry were the ones that you received from Kramer and you said yes, didn't you? A. Yes, sir.

Q. And before the Commissioner, when you were asked where these same papers were gotten from you said from a man you didn't know, is that correct? A. Yes, sir.

Q. You know who Kramer is now, don't you? A. Yes.

Q. But you say you didn't know Kramer? A. I didn't mention anything there.

Mr. Weinberger: I concede that he testified that he didn't know Kramer before that meeting.

A. (Continuing) Before that meeting I did not.

Q. I didn't ask you that at all, Mr. Weinberger! I simply ask you now whether you say you got these pamphlets that were taken from you and that were offered in evidence from Kramer and your answer was yes, is that right? A. Yes, sir.

Q. Before the Commissioner when you were asked the same question you said you could not recall what the man looked like that gave them to you, is that right? A. Yes, sir.

Q. And Kramer was sitting right next to you in the Commissioner's room, wasn't he? A. Well, he was within two feet.

Q. He was within two feet of you, wasn't he? A. Yes, sir.

Q. Now, Mr. Walker, did Kramer ask you to give this out? A. No, sir, he did not have time to ask me, he just gave them to me.

Q. He didn't ask you to give them out? A. On that, I did not see what it contained on that picture at all——

Q. Will you wait a moment, Mr. Witness, that is a very simple question, you can answer it yes or no. This is a simple question: Did Kramer ask you to give them out? A. No, he did not ask me to give them out.

Q. Will you look at me? Didn't he? A. Yes, sir.

Q. Didn't you tell me up in my office a few days ago that Kramer gave these to you and asked you to give them out? A. He gave them to me, he did not ask me to give them out.

Q. Did you say to me in my office that Kramer gave these papers to you and told you to give them out? A. He gave them to me.

Q. I asked you whether in my office you did not tell me that Kramer gave those to you and asked you to give them out? A. No, he gave them to me with the implication that I would give them out, he didn't have to ask me or to tell me to.

Q. You knew you were to give them out? A. I knew the moment I received the parcel that it was so considered.

Q. You tried to put the papers away? A. Yes, because knowing that they were loose papers and were handed to me I should naturally try to give them out but when I knew what they was—I didn't conscience what they was—I didn't want to give them out, and right then the soldier grabbed me.

Q. You told me you didn't know what it was? A. No, I didn't know it was unlawful until that.

Q. Why didn't you know that it was unlawful? A. On account of being seized by the officers and soldiers.

Q. So you didn't try to put them aside before you were seized? A. No, because the moment I got them, they were given to me with the blank side of them up and I turned them the other side around.

Q. You heard testimony that Kramer was arrested and that you were not arrested until after Kramer was arrested? A. Both was arrested together.

Q. Both were arrested together? A. Yes, sir.

Q. At the very same moment? A. At the very moment, after he gave them to me, why, I had the pamphlets.

Q. You said that you worked on an Army transport. You did not take oath to the United States, did you?

Mr. Weinberger: I object on the ground it is incompetent, irrelevant and immaterial.

Mr. Content: Mr. Weinberger wants it to appear as though you were in the Army.

Mr. Weinberger: I say he worked on an Army transport.

A. I was only on a transport.

The Court: He may tell.

A. (Continuing) I was on the United States Army Transport *Kilpatrick.*

Q. You were not an enlisted man in the Navy? A. Not that, no; I was work on a transport, an American transport.

Q. You were just like other sailors that were doing routine ship work? A. Certainly, yes.

Q. You didn't take any oath to the United States? A. No.

Q. That is what I mean. A. I was on both of them ships.

By the Court.

Q. Let me ask you, Mr. Walker, where were you born? A. I was born in St. Louis; but I lived the biggest part of my time in London, a great deal I lived, quite a bit in London and France.

Q. You were born in St. Louis? A. Born in St. Louis in 1882.

Q. Were you employed at the time of your arrest? A. Yes, sir, I was at Bacon Brothers Print House, working on the day shift.

Q. Where were you living? A. 3 West 13th street.

Q. Had you ever seen Kramer before that date? A. I never knew Kramer before.

Q. Is that the first time you ever saw him? A. First time I ever saw him in that night, in that building, unconsciously I drifted in there, I never knew what in the world it was, I did not know it was that kind of a meeting.

Q. You never saw Kramer, or knew of this man before? A. No.

Q. That is the first time you ever saw him? A. Yes.

Q. Now, in justice to yourself, how was it that when you were before the Commissioner you said something to the effect that you did not recognize Kramer? You give your explanation. A. Gentlemen, excuse me, you know when they got me over there under oath I didn't know I was under oath before that, and when I found myself over in this place I am staying in Center street, anyway he talked about me, he had me so intimidated that I didn't know nothing; I am troubled with neurasthenia and perhaps I said something that I should not have said there.

Q. Is that your explanation? A. He had me so intimidated.

Q. We were talking about the time you were before the Commissioner. A. Yes.

Q. Were you sworn there? A. What do you mean sworn?

Q. Did the Commissioner take your oath before you answered a question? A. There was a whole lot done, you asked me if——

Q. You were put under oath there, down there, weren't you? A. I cannot quite recall directly, my mind was so shaken.

By Mr. Content.

Q. Were you sworn to tell the truth, the whole truth and nothing but the truth, before you testi-

fied in your behalf before Commissioner Hitchcock? A. I can't recollect.

By the Court.

Q. You say you can understand Yiddish? A. Not very well, very poor I speak it.

Q. But you have been able to understand it? A. I understand some.

Q. You are able to understand Sternberg? A. Sternberg—no, Sternberg cannot express himself in English language.

Q. I said Yiddish? A. Some things I can and others I cannot.

Q. I thought you said Sternberg could speak a little broken English. A. No, he cannot speak English, his English is very, very bad.

Q. Didn't you say something to the effect that since you have been in the Tombs, he made himself understood? A. Yes, some things. He said as such things as coffee and meals and so on, and to that effect naturally, but otherwise he cannot make himself understood.

Q. So you have never had any connection with any of these men before? A. No.

Q. And you never met them anywhere? A. Only up there, and over there in the front office.

Q. And when Kramer handed you these papers, did he make any motions to indicate anything of that sort? A. No, he did not because we were grabbed right away; they was given me with the intention of distributing, but I didn't, I didn't have time to.

Q. How do you know they were given to you with the intention of distributing them? A. They must have been, there was a bundle of them.

Q. There was a bundle of them? A. Yes, there must have been about thirty-five, I suppose, in there.

(Adjourned to June 12, 1917, 10 o'clock A. M.)

New York, June 12, 1917, 10 A. M.

Trial resumed pursuant to adjournment.

Present:

The Court, counsel and jury, same as before.

HAROLD A. CONTENT, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your full name, Mr. Content, and address? A. Harold Augustus Content.

Q. You are an Assistant District Attorney of the United States? A. I am an Assistant United States Attorney for the Southern District of New York; and I have also been a Special Assistant to the United States Attorney for the Eastern District of Pennsylvania.

Q. You were sworn, of course, as an Assistant United States District Attorney, to uphold the Constitution? A. I have taken an oath to uphold and support the Constitution and laws of the United States of America.

Q. And you are an attorney, duly admitted to practice in all departments? A. I was admitted to the Bar of the State of New York in October, 1911, and in the Federal Southern District of New York some time in 1912.

Q. You are familiar with the Constitution of the United States? A. I am familiar with it, I don't know that I am as familiar as you are.

Q. You are familiar with Section 4 of the Amendment to the Constitution which reads as follows: "The right of the people to be secure in their houses, papers and effects against unreasonable searches, and seizures shall not be valid and no war-

rant shall issue upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." A. There have been no search warrants in this case.

Q. Are you familiar with that? A. I am familiar with that section on unlawful seizure.

Q. Did you see James J. Finan, the officer who made the arrest in this case? A. Did I what?

Q. Did you see him last night? A. I did, sir.

Q. Did you see Benjamin Silverman? A. Yes, I saw Silverman last night.

Q. Did you see Lawrence Bevins last night? A. Yes, I did not speak to him, but I saw him.

Q. Did you see James Henry last night? A. I don't think I spoke to him, except——

Q. You saw him? A. Yes, sir.

Q. And the other officers who testified in this case?

Mr. Weinberger: Officer, stand up. (A man stands up in the courtroom.)

A. I think I saw Bauland, I don't want to be sure.

Q. You saw every officer and detective who testified in this case last night, didn't you? A. Well, I don't think Heard was there, I remember seeing Moroney, but I would not be sure of Heard. I would not want to take my oath on that, Mr. Weinberger, as I don't want to make any misstatements. I know I saw Finan, he went over with me, I think, he dined with me. I saw Silverman when I got to the entrance of the hall, and I saw Henry later, and there was an Assistant United States Marshal——

The Court: What has all this got to do with this case?

Mr. Weinberger: It is in reference to his men and their testimony.

The Court: You mean to say that these witnesses, being in a meeting last night, has

anything to do with this case? Answer the question yes or no.

Mr. Weinberger: No, but these men going to a place and arresting people and cursing them, and forcing them to testify in contradiction to the Constitution of the United States, under the direct supervision of the District Attorney, is very material to this case to show that they were there, whether they got it constitutionally, legally, or not, they were there and were willing to stretch any right.

The Court: Now you know, as a lawyer, that what you are saying is not proper. I will permit no further questions on this line.

Mr. Weinberger: I contend, and I want it clearly on the record, that this is the purpose of this testimony, that I want to show that all the officers that testified——

The Court: I will not permit you to make that statement.

Mr. Weinberger: There is no way——

The Court: Be quiet. You are now referring to some event last night, connected with a public meeting, are you not?

Mr. Weinberger: I am.

The Court: Very well, I will hear nothing further upon that subject.

Mr. Weinberger: And I submit that I must have on the record, to defend these defendants in this court and before this jury, that I must have upon this record that I believe it is perfectly material to show that these men, whether it happened before the incident on which they are being tried or afterwards, I submit if you can show the character of this man, that he does not believe in obeying the law himself and does not believe in obeying the Constitution and he proceeds to violate it, and I contend it is perfectly material to

show this to the jury so that they can properly weigh their testimony.

The Court: Very well, take your objection. I overrule any such line.

Mr. Weinberger: I respectfully except.

The Court: Very good. Now go on. Anything further?

Q. Was it by your direction, Mr. Content, that these men went to the Madison Square Garden meeting? A. It was not. I was at the meeting but I did not know any of these men except Mr. Finan, whom I haven't seen in two years.

Q. Do you know anything of orders by the Attorney General to arrest men, and force them to answer questions? A. No; I know that the Attorney General of the United States has ordered all officers of the law and all good citizens to uphold the laws of this country and to see they are obeyed and lived up to.

Q. That is not in answer to my question, Mr. Content. Mr. Stenographer, will you please read it.

Q. (Question read.) A. There are no such orders, Mr. Weinberger, nor to force people to answer questions. There are orders by the Attorney General to arrest men who wilfully violate the laws of the United States.

Q. Are there any orders of the United States Attorney General to soldiers or police, to arrest the people and force them to show cards, contradictory to that section of the constitution that I read to you?

Mr. Content: I object, if your Honor please.

The Court: The objection is sustained.

Mr. Weinberger: I respectfully except.

Q. Do you know and didn't you see—I will change that question. Didn't you see the officers in this case and the soldiers, compelling people to answer

questions and to show cards last night? A. I did not.

The Court: Now, Mr. Weinberger, you know——

Mr. Weinberger: Your Honor——

The Court: Don't you answer until I get through, then you can make any answer you please. You know as a lawyer, that that is a very improper question. You know that has nothing whatever to do with the case. You know that that is an effort to introduce into this case a collateral issue as to something that happened subsequent, which could be readily disposed of and readily tried, if necessary. It has nothing to do with this case, and I warn you now, that I will not permit any further reference to any proceedings at a public meeting last night.

Mr. Weinberger: I respectfully except to your Honor's remark, about my question being improper; and I offer, on the question of whether it is proper, to submit this to your Honor: That at all times—I am going to argue a proposition of law only——

The Court: I have ruled and you have an exception.

Mr. Weinberger: That is not satisfactory unless I can feel, if the Court pleases, unless I can feel certain that I have placed my legal argument before the Court, and then the Court has ruled; and I am only going to argue on the legal proposition, and I think on the facts——

The Court: I will not permit you to make an argument and to state in the presence of this jury——

Mr. Weinberger: I ask that the jury be withdrawn.

The Court: No, it is not necessary. I have a question before me. I have ruled on it, now proceed.

Mr. Weinberger: And I respectfully submit that in order to——

The Court: You may take an exception if you so desire.

Mr. Weinberger: That is not enough, if your Honor pleases. My point is this: At the present time there is a feeling that these men must be convicted——

The Court: Now, Mr. Weinberger, you go on and ask questions.

Mr. Weinberger: May I ask that the jury be withdrawn while I argue the question with the Court?

The Court: No, the jury will not be withdrawn. We will go on and try this case now. Your objection is overruled, and you will proceed.

Mr. Weinberger: Very well.

The Court: Continue with your questions if you have any.

Mr. Weinberger: May I ask your Honor again that this jury be withdrawn.

The Court: I have already stated no. Go on with your questions.

Mr. Weinberger: One moment, your Honor. I will state this to your Honor, make this statement before the jury——

The Court: I don't desire to hear any argument on a perfectly obvious proposition of law.

Mr. Weinberger: Perhaps it won't be so obvious.

The Court: Mr. Weinberger, continue.

Mr. Weinberger: I respectfully except to the refusal of the Court to ask the jury to be withdrawn, and to allow me to argue the legal proposition.

The Court: Very well, go on and ask your questions, that is the orderly way to proceed and try a lawsuit.

Mr. Weinberger: I haven't any more questions to ask.

Mr. Content: Will your Honor permit me, as a member of the bar——

Mr. Weinberger: I object to any statement by Mr. Content as a member of the bar.

The Court: You can ask yourself a question.

Mr. Content: I have no questions to ask.

The Court: Then say nothing.

LOUIS STERNBERG, one of the defendants, called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Mr. Content: Mr. Weinberger states he needs an interpreter. If so, the Government will furnish an interpreter.

(Jacob Shapiro was duly sworn to act as interpreter.)

Q. Where do you live? A. 49 Rutgers.

Q. Ask him whether he registered on June 5th Show your card. A. I registered Saturday night in prison (producing a card showing registration).

Q. At the Madison Square meeting on May 31st, did you go there with anybody? A. No, sir.

Q. What did you go to the meeting for? A. I thought they would speak Yiddish, so I went to listen to it.

Q. Can you talk English? A. No, I cannot.

Q. But you understand English a little bit? A. I don't understand anything, sir.

Q. Are you an anarchist? A. No, sir.

Q. Do you belong to a labor union? A. No, sir.

Q. Do you understand "labor union"? A. I be-

long to my union that I am employed by—ladies' hats.

The Court: That is a labor union.

Q. Ask him whether—are you a Socialist? A. No, sir.

Q. Are you a member of the No-Conscription League? A. No, I am not.

Q. Are you a member of any organization to resist conscription or registration? A. No, sir, I never was.

Q. Have you taken part in any meetings against conscription? A. No, sir.

Q. On the 31st day of May, did you give out any leaflets there, people's exhibits 1 and 2, or both (handing same to witness)? A. I did not.

Q. The officers testified—one officer or militiaman testified that he found those pamphlets in your pocket. Where did you get them? A. They found them in my pocket.

Q. Where did you get them? A. A man gave it to me, I don't know who he is.

Q. Where did he give them to you? A. On the balcony. I was sitting on the balcony. I was sitting on a bench.

Q. Did you throw any of these leaflets from the balcony? A. I did not.

Q. Did you give out any of these leaflets after you got them? A. No, sir.

Q. Were you up in the—did you not know Becker——

Mr. Weinberger: Becker, stand up, please.

Q. (continuing) Before you were arrested? A. No, sir, I didn't know him.

Q. Did you know Mr. Kramer before you were arrested? A. No, sir.

Q. Did you know Mr. Walker before you were arrested? A. No, sir.

Q. Did you at any time stand with these three men in the balcony at the Madison Square Garden meeting? A. I had not seen them; I don't know who they are; I was never with them.

Q. So that when the detective and the militiamen say that you and these three men were up in the balcony giving out leaflets, that is not so?

Mr. Content: If the Court pleases, I don't like to interrupt, but there is no testimony that people or militiamen saw them giving out these in the balcony. The soldier testified—or Mr. Bevins testified that he saw them dropping.

By the Court.

Q. The sailor that was on the stand yesterday said that somebody was dropping these circulars from the balcony; that he, the sailor, looked up, and that it was Sternberg. Then he went up, the sailor went up to the balcony, that is Mr. Bevins, and he saw two people there, one of whom was Sternberg, and asked him whether he dropped any of these things from the balcony. A. The only thing I had was these two circulars in my pocket, and they arrested me. I was sitting on my bench. They arrested me because I have these two circulars in my pocket.

By Mr. Weinberger.

Q. Were you with Becker, Kramer and Walker at any time when they—when Becker and Kramer handed out circulars? A. I don't know, I never saw him in my life, and was never with him.

Q. And you were not one of a group that got circulars to distribute over the Garden? A. No; if I could only know how to read it, I would not have taken it at all, I did not see it.

Q. And when Detective Finan and the officer testified that you, Kramer and Becker, and Walker

were together in a group on one of the balconies giving out these pamphlets or getting them, that is not true, is it? A. No, it is not true.

Q. Neither Kramer nor Becker handed you a bundle or this bunch whichever you choose to call it, and asked you to go on the balcony and to give them out? A. No.

Q. When did you first see Kramer on that night of the arrest? A. When they arrested me, and when they took me downstairs, then I saw the other men.

Q. Never saw them before? A. Never saw them before.

Q. Walker is a member of a labor union. Did you ever meet him in your labor union?

The Interpreter: He wants to know if it is a hat makers'.

Mr. Weinberger: What is that?

The Interpreter: Whether he is a member of the hat makers'.

Mr. Weinberger: No, printers' union.

The Witness: This union does not come together with the other, and I don't know him.

Q. Did you say to Sternberg—no, to Walker, in English, "Did they get any circulars," after you were arrested? A. I did not, I don't know how to express it—I don't know how to make it out in English.

Q. Did he say to you, "They got everything I had"? A. No, he said nothing to me. I only asked them, "I am not guilty, gentlemen, I don't know anything; what did they arrest me for"; that is all I asked.

By the Court.

Q. Did you say that in English? A. No, in Yiddish.

Q. To Walker? A. I said in Yiddish to Walker, "I don't know anything at all," and "What they arrested me for?"

By Mr. Weinberger.

Q. And did you then say to him, "Did they get anything on you?" A. I have not said a word—didn't say anything.

Q. Did you say anything in a whisper to Walker, "did they overhear any of your conversation regarding instructing the men not to register next Tuesday?" A. No, I never said it in my life.

Q. Did you say it in English or Yiddish? A. I never said it.

Q. And did Walker then say to you, "I guess there is a number of detectives in the building, and they must have overheard us"? A. He never said anything like that to me, nor did I say anything to him.

Q. And then did you answer, "Well, I guess they get us then"? A. I never said it.

Q. Did Officer Silverman say to you, "Boys, now this is a little favor, a little silent tip: the less you say now, the less will be used against you"? A. He never said a word to me about it.

Q. They only took you to jail? A. That is all they did.

Q. Now, when you were arrested, where did they take you to? A. 57th street court.

Q. And what happened there? A. They searched me to see whether I have got any money or anything else, and then they put me in a cell.

Q. Did they tell you at that time what you were arrested for? A. Never said a word to me.

Q. How old are you, Mr. Sternberg? A. Twenty-four.

Q. And when did you come to this country? A. Four years ago.

Q. And how long have you worked in the place where you are working now? A. Four years. Since I arrived here I am working there.

Q. You did not go to public school or night school? A. No, I did not go, because I had to work, I got to support my family in order to send money home.

Q. Whom do you send money home to?

Mr. Content: I object to this, if your Honor please.

The Court: I will let him answer.

A. To my parents at home.

Q. And what are your hours where you work? A. From 8 in the morning until 6 in the evening, one hour for dinner.

By the Court.

Q. What is the name of the firm that you work for? A. Borenstein & Sons.

By Mr. Weinberger.

Q. That is the same firm you worked for, for the past four years? A. Before, I lived in Wooster street, now I live in over here.

Q. But you worked for him now four years? A. Yes, sir.

Q. Do you ever work overtime? A. If it is necessary, sometimes; sometimes not.

Q. When you went to the meeting did you see policemen around the door? A. I saw a lot of policemen around the door.

Q. Did you see policemen inside? A. Inside I didn't see any, I only saw outside.

Q. Did you see soldiers in the building? A. When they—when the speaker addressed the meeting, then I seen soldiers sitting down but otherwise I did not see any.

Q. Have you ever given out pamphlets of any kind before May 31st? A. I don't know what it is, I never had any in my life.

By the Court.

Q. Did you ever give out any pamphlets at any other time?

Mr. Weinberger: Or any other kind of pamphlets.

A. No, sir.

By Mr. Weinberger.

Q. Did you ever give out pamphlets in reference to anything else, or in reference to this conscription or other matters? A. I didn't go to any meeting. I didn't go anywheres.

The Court: The answer is, in effect, "No."

Q. In the balcony where you were sitting, did you see anybody there throw leaflets off the balcony? A. No, I didn't see it; I don't know.

By the Court.

Q. Let me ask you: where did you get the two leaflets, the different papers that you had, the leaflets?

Mr. Content: That is a bundle, your Honor.

Q. Where did you get the leaflets that were found on you? A. A man walked around the balcony and distributed them, I don't know what it is, I put it in my pocket.

Q. Hold up that bundle. (Same is held up.) Did you have all those—it has been testified that you had this bundle or group of papers which are now shown you, being Government's Exhibit 6. Is that correct? A. That was much less than that.

Q. How many did you have? A. There may have been five or six circulars, it is very thin, not as heavy as this.

By Mr. Weinberger.

Q. So that if the officer testified that he took that heavy bundle out of your pocket, and there was just as many as there are now there, he was not telling the truth? A. It is not true.

Q. Where did you get these pamphlets, on the way in or out, what time? A. While I was sitting on the balcony, a man passed by and gave—it must have been around half past nine or ten—and gave me a few of those circulars.

Q. And you say there was no more than four or five of the circulars that he handed to you? A. That is all it was, very thin, and this package is too heavy.

Q. Sternberg, do you know Mr. Kiminitz Litovsky? A. I do.

Q. Do you believe in opposing government? A. I believe in the country.

Q. He believes in the government? A. Yes, sir.

Q. And you believe in obeying the law? A. I do.

Q. And you do try to obey the law? A. Yes, sir.

Q. Have you ever been convicted of any crime? A. Never in my life.

Q. This is the first time you were ever before arrested? A. The first time.

Q. When you were asked to register, who asked you to register in the Tombs? A. Saturday they let all the prisoners out, they should register, so we went into a line, they called my name out and I registered also.

Q. Who spoke to you when you registered? A. A man not very tall.

Q. The warden of the Tombs?

Mr. Weinberger: Stand up. (Man stands up.)

Q. Is this the man? A. Not this man, the other man that talked Yiddish, he was in uniform.

Q. Did he ask you the questions? A. He asked me questions. And he wanted to know whether I am ready to go as a soldier. I answered, if necessary I will go.

Q. Did he ask you the other questions that were printed on the paper? A. He asked me whether I believed in war, and I said sure. That is all I said to him.

Q. Did he ask you anything, where you were born, and when you came to this country? A. He asked me where I lived, and what State I came from, and I told him every thing.

Q. Told him what and where and when you were born? A. I told him 24 years ago, so he figured it out, that is all he said.

Q. Did he ask you whether you ever had any military training? A. He never asked me that.

Q. When he got through asking you these questions in Yiddish, you signed the paper? A. Yes, I signed my name in Hebrew.

Q. Who composes the firm of Borenstein & Sons, that you worked for? A. N. H. Borenstein & Son.

Q. Who is the manager of Borenstein & Son? A. Rosenthal is the name, Mr. Rosenthal, he is the foreman.

Q. Who is the manager? A. The bosses themselves.

Q. Is Mr. Press in court (a man stands up). What is Mr. Press's business in that place? A. He is the foreman.

Q. Is Mr. Borenstein in court (a man stands up). Is this one of the firm of Borenstein & Son? A. Yes, sir, the son.

Q. Did you ever attend any school to learn English in the four years that you were here? A. No, I had no time to go.

Q. Was there anybody that knew you were going to Madison Square Garden before you went? A. I went with a friend of mine from the shop.

Q. And did he have any literature to give out? A. No, he had none of it.

Q. And he did not get any there? A. He didn't get any there.

Q. And you didn't arrange with that friend to meet anybody there to get literature? A. No, I didn't talk to him and I didn't know anything at all about him.

Q. As far as you know, before you went to that meeting, you didn't know that they were going to give out literature against conscription? A. If I would have known what it was, I would not have gone there at all; not at all.

Q. And at any time did you know that they were going to have a meeting, or there was a meeting going to be held at Hunt's Point Palace? A. I did not.

Q. Can you read English, if you cannot talk it? A. No, sir.

Q. Can you read any language? A. The only language I can read is Yiddish.

Q. Do you write Yiddish? A. Yes, sir.

Cross-examination by Mr. Content.

Q. What time did you get to this meeting on the 31st of May, 1917? A. About seven o'clock.

Q. About seven o'clock? A. Yes, sir.

Q. What time did you go inside the Garden? A. Eight, or a little after eight.

Q. You thought they were going to speak in Yiddish? A. I thought they would talk Yiddish.

Q. And they only talked English, didn't they? A. Yes, sir.

Q. And you stayed there for three hours or other during two hours of the meeting, though you could not understand a word they were saying? A. Had I known that they would only have talked English I would not have gone there; and while I was there I thought there would be some Yiddish speakers, so I wanted.

Q. So you just waited for three hours? A. Maybe two and one half hours.

Q. Who told you about the meeting in advance? A. It was published in the Jewish papers that there would be a meeting.

Q. What is the name of this friend of yours that went with you to the meeting? A. Jake Schoenfeld.

Q. Is he here in court (a voice said "yes," and a man stands up)? A. Yes.

Q. Can he speak English? A. A little bit English.

Q. You don't speak any English at all? A. No.

Q. How did you give your pedigree at the police station, I mean at the Night Court, at 57th street night court? A. I spoke in Yiddish, and Morris translated it into English.

Q. Did this gentlemen talk to you at all on registration at any time in the Tombs (indicating the Warden? A. He spoke to me in English and I answered in Yiddish, I answered him in Yiddish.

Q. Didn't you answer any questions in English? A. He asked the questions in Yiddish, and I only answered him in Yiddish.

The Court: Let the record indicate that the man referred to was Warden Hanley.

Q. What were you doing with the contribution blank of the No-Conscription League in your possession if you were not interested in that league? A. I didn't have it, I don't know what it is.

Q. That is a part of Government's Exhibit 6. Did you speak to any of these officers at all in English? A. No, sir.

Q. You say that in the court they asked you questions in English and you answered them in Yiddish? A. They asked me English questions, they asked—they only asked me what were you arrested for and then in Yiddish.

Q. Did they ask you your age? A. Yes, and I answered in Yiddish.

Q. Your residence? A. Yes, and I answered in Yiddish.

Q. You were speaking some English in the Commissioner's office the day of the hearing, Saturday, a week ago, weren't you? A. I did not talk English.

Q. Why, didn't you answer the first few questions to me in English before you asked for an interpreter? A. I spoke to him in Yiddish, and he said come to me into my room and he spoke to you in English, he said, that is, the District Attorney, Mr. Content, you asked me some questions in English and I answered you in Yiddish, so you said to him, come into my room and I will talk to you in English.

Q. I didn't mean in my room, down stairs, I meant the day of the hearing. Didn't I ask you the first two questions on cross-examination in English, and didn't you reply to me in English. A. I answered in Yiddish.

By the Court.

Q. Do you understand what you are being asked now: The day that you were before the Commissioner, the gentleman with the white beard? A. No, I answered him in Yiddish.

Q. Did you have any conversation at all with the defendant Walker in the Madison Square Garden? A. Only I didn't speak a word to him, only when they arrested me, and they put us together, then I said to him, "What did they arrest you for?"

Q. In what language did you speak in? A. In Yiddish.

Redirect examination by Mr. Weinberger.

Q. Did you ever—as far as you know, did you have one of these contribution leaflets in your pocket (indicating paper)? A. No.

Q. Have you ever seen that before it was shown to you here today? A. I never saw it until the present moment.

Q. Did they show it to you in court? A. No.

Q. Did they take any of these out of your pocket, so far as you know? A. No, only these two papers.

Q. They say that you had this one in your pocket at the time they took the other pamphlets out (indicating)? A. The circular, that I did not have.

Q. When you were given Government's Exhibit 1, and Government's Exhibit 2, were they out flat? A. It was together like this (indicating). It was folded like this (indicating).

Q. When you appeared before the Commissioner in a room on this floor, when I was there and Mr. Content spoke to you, did someone else ask you the same question in Yiddish? A. Yes, it was another lawyer with glasses and he spoke to me in Yiddish.

Q. Do you know whether his name was Harry Goidel? A. I didn't know his name.

Q. And he asked all the questions in Yiddish? A. He was told to ask me what I talk, and he afterwards translated it.

Q. And at no time did you talk English before the Commissioner when you were being examined with the other defendants and I was there? A. Only Yiddish I spoke.

Q. In the Tombs, who was there besides Warden Hanley, when he asked you questions?

Mr. Content: That has been gone into on direct, and I don't know whether it is proper on redirect, your Honor.

A. There was another man in uniform, not very tall, pretty stout man.

Q. Did he talk to you, too? A. He spoke to me in Hebrew.

Q. That is the man that asked you all the questions about registering? A. Yes, sir.

By the Court.

Q. Let me ask you this: You remember when the sailor arrested you? A. Yes, sir, I do.

Q. Well, was that friend of yours, Jake Schoenfeld, with you then? A. Yes, sir, he was standing looking at the people and I was sitting on the bench.

Q. Was he right beside you? A. He was as far away from me, about as far as that (indicating).

Q. Indicating a foot and a half? A. A foot and a half.

Q. Was there anyone else near you? A. There was plenty of fellows near me.

Q. When you were arrested at that time was there anyone in the balcony where you were, in the vicinity, alongside of you and Schoenfeld? A. There was a lot, a whole lot of people there that night.

Q. When you were arrested? A. Yes; there was quite a whole lot of people.

Q. Right near you? A. Right around me, some of them were away, too.

Q. That is what we are trying to find out. Direct your mind to the time that the sailor, Bevins, arrested you? A. There was a lot near, when he started to arrest me, and quite a lot of people went out, and there was some people not very far away from me.

Q. Now didn't your friend Schoenfeld have any of these circulars with him? A. No, sir.

Q. You are sure of that? A. Sure, I can swear to it.

Q. He did not have any at all? A. He only listened to what the speakers had to say.

Q. Well, did you notice whether any of the people near you had any of the circulars? A. No, I did not see it, I only put it in my pocket.

Q. As I understand you, you never saw Kramer or Becker before your arrest? A. I never saw them.

Mr. Weinberger: I want to break the continuance of this, and call Mr. Crimmins, who

is a very busy man, and I want to call him as a character witness for Walker.

The Court: Very well.

JOHN J. CRIMMINS, a witness called on behalf of the defendant Walker, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. Have you given your address, Mr. Crimmins? A. 3 West 13th street.

Q. What is your business, Mr. Crimmins? A. Financial Secretary of the Printers' Union.

Q. Do you know Mr. Walker? Walker, will you stand up, please. (Defendant Walker stands up.) A. I do.

Q. Is he a member of your union? A. He is.

Q. How long have you known him? A. About twelve or thirteen years.

Q. Do you know other people who know him? A. I do.

Q. What is his reputation for truth and veracity? A. It is the best as I know it.

Q. Mr. Crimmins, are you a member of any Anti-Conscription League? A. No, sir.

Q. You are not an anarchist either? A. No, sir.

Q. You are a labor union man? A. Yes, sir.

By the Court.

Q. How long have you known Walker, Mr. Crimmins? A. Since he became a member of the union, about twelve or thirteen years.

Q. About twelve or thirteen years? A. Yes, sir.

Q. How often have you seen him in that time? A. Well, I have seen Mr. Walker sometimes when he is out of a position, daily. We have a custom in our union, when a man is out of a position, he re-

ports at the headquarters and leaves a roll call up there of those that is looking for a position. Mr. Walker, when he was out of a position, came to headquarters, and I sent him out to work.

Q. And did you get any complaints on any of the jobs that you placed him in? A. He has not had any; he is a good workman and I know him.

Mr. Content: No more cross-examination.

JACOB SCHOENFELD, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Schoenfeld, are you an anarchist? A. No.

Q. Are you a Socialist? A. No.

Q. Do you belong to a labor union? A. I belong to a union, yes.

Q. What labor union do you belong to? A. Ladies' hats.

Q. Do you know the defendant Sternberg? A. Yes, sir.

Q. Do you know—how long have you known him? A. I know him from old country.

Q. From Russia? A. Yes.

Q. Did you come over with him? A. Yes.

Q. On the same ship? A. Yes, sir.

Q. And during the four years that you were here, have you continually known him? A. Yes.

Q. You work in the same shop that he does? A. Yes.

Q. Have you worked in that same shop four years too? A. No, sir, two and one half years.

Q. How many years? A. Only two and one half years.

Q. Only two and one half years. In that time, and since the time that you come from the old coun-

try, and came over here, in the four years since he was here, did you ever hear him talk English? A. No.

Q. Can he talk even broken English? A. No, not at all.

Q. Did you go with him to the meeting at Madison Square Garden? A. Yes, sir.

Q. Where did you start from? A. From a restaurant.

Q. Where was that restaurant? A. On Third street.

Q. How was it that you went to the meeting with him? A. He was reading in the paper about it.

Q. What paper did you read it in? A. *The Forward*, Jewish paper.

Q. You read it in the *Vorwarts*, too? A. Yes, sir.

Q. When did you tell him about that? A. The same day, the day—the same day we was reading the same paper.

Q. He was reading with you? A. Yes, sir.

Q. What time did you come to this meeting? A. Seven o'clock, we started to walk.

Q. And what time did you read this paper, in the evening? A. It was in the morning, it was in the afternoon.

Q. In the afternoon. The same day you went to the meeting? A. Yes.

Q. And that was the first time you had an idea of going to the meeting? A. Yes.

Q. You didn't belong to the No-Conscription League? A. No.

Q. You are not opposed to conscription? A. No.

Q. Not opposed to registration? A. I am not of age yet.

Q. You are not of age? A. No.

Q. You are not opposed to the principle of registration? A. No.

Q. You have taken no part in any meetings against conscription? A. No.

Q. When you went from the restaurant with Sternberg to the meeting, tell us what you did when you got there? A. We were standing in line, and then we walked upstairs and sat down in the balcony.

Q. How long did you stand in the line? A. About an hour.

Q. And what entrance did you go up, to get to the hall? A. The other side of the building.

Q. The main entrance? A. Yes, the main entrance.

Q. You were standing in line on what street? A. On Fourth avenue.

Q. And you had to go down Madison avenue to get in? A. Yes, sir.

Q. You didn't attempt to get into any committee entrance on Fourth avenue, did you? A. No, sir.

Q. You went in like the rest of the public? A. Yes, sir.

Q. When you got in, what part of the building did you have a seat in? A. On the balcony.

Q. What balcony? A. On the last balcony.

Q. And he was with you all the time? A. Yes, sir.

Q. Did you have any of Government's Exhibit 1, or Government's Exhibit 2 with you? A. No, I did not.

Q. Did you get any of these pamphlets while you were there? A. No, I didn't get any of them.

Q. Did you see defendant Sternberg come there with any pamphlets like that? A. No.

Q. Did you see when he got these pamphlets? A. No.

Q. How long were you sitting there before the arrest? A. About an hour and a half.

Q. And what, tell us how the arrest took place? A. Two soldiers came over and he says, "Who gave you that?" So he said, "A man gave it." He said, "You are under arrest."

Q. You mean the soldier, or do you mean a sailor? A. A sailor and another soldier.

Q. He said what? A. He says, he asks him, "who gave you this paper"; there was two or three, I don't know; he said, "A man gave them to me," and he looked him over.

Q. And then what happened? A. Then they took him away; I wanted to go with him, and he said, Mr. Schoenfeld came with me, and he sat right there.

Q. And he sat there? A. Sat right there.

Q. Were you with Sternberg from the time you went into that building until the time he was arrested? A. Yes, sir.

Q. Did you see him at any time with Becker, Kramer or Walker—will you stand up, please (defendants stand up)? A. I did not.

Q. Did you see either of these three men at any time in your life? A. Never in my life until the present time.

Q. Did you see these two men, Becker and Kramer, give out a lot of pamphlets, and give them to Sternberg as one of the men, and tell him to give them away? A. I never saw him before until now.

Q. Did you see anybody hand Sternberg any of these circulars? A. Yes, I saw, but I could not recognize him.

Q. When was it that you saw somebody hand him circulars? A. In Madison Square Garden.

Q. Did you see how many circulars he had with him? A. I could not tell you how much, but a few only.

Q. A few only? A. A few in all.

Q. You could not describe the man? A. No.

Q. Was that before you went to the balcony? A. No, on the balcony.

Q. You mean while you were there, they came around and handed these out, these circulars? A. They came along at that time with the circulars.

Q. Were you and Sternberg in your seats when

that occurred? A. He was seated away from me, I think.

Q. You were in the next seat to him? A. Next seat to him; I was in this way when he was in behind me (indicating).

Q. He was behind you? A. Yes.

Q. Well, then, you were in one seat and Sternberg sat behind you? A. Yes.

Q. Now did you see what happened, did somebody go around and give out circulars? A. Yes.

Q. And did you see the circulars, not the circular? A. No, I saw them when they arrested him.

Q. The only time you saw them was when they arrested him? A. Yes.

By Mr. Weinberger.

Q. Was it a large bundle, big like this, when they arrested him (indicating)? A. Never had a bundle like that.

Q. You are sure he never had a bundle as big as that in his pocket? A. I am sure for at the time they were arresting him I says wait to the soldier, and he hesitated, and he said, look at the papers that is here.

Q. How much, a few papers? A. Yes, sir.

Q. Did you see Sternberg throw any of these leaflets over the balcony? A. No, sir.

Q. If he wanted to throw any of these over the balcony he would have to do it by getting up and going to the front to be where he could? A. Yes.

Q. You are positive he did not throw any over? A. Yes, sir.

Q. In all the years that you have known him, all the places that you went with him, did you ever hear him talk in English to anybody? A. No.

Cross-examination by Mr. Content.

Q. When did you come to the United States? A. Four years ago.

Q. When, what month? A. I think it was June.

Q. June, 1913? A. Yes.

Q. What ship did you come on? A. Ship *Lapland.*

Q. How old did you give your age then to the immigrant authorities? A. Twelve years.

Q. You gave your age as twelve? A. Yes, sir.

Q. So you are only sixteen now? A. Yes, sir.

Q. That is all? A. That is all.

Q. Sure of that? A. Quite sure, I am older than that, but I had a half ticket.

Q. What is that? A. I was small when I came over here.

Q. How old are you now? A. I am nineteen years now.

Q. You gave your age as twelve, four years ago? A. Yes, sir, I was very small.

Q. You were very small, so you gave your age as indicating that you were that age, is that right? A. Yes, sir.

Q. Four years ago then according to your present testimony you were fifteen, is that right? A. What is that?

Q. How old were you four years ago? A. Four years ago?

Q. Yes. A. Twelve.

Q. How old were you four years ago?

The Court: Objection overruled.

Q. How old were you when you came to the United States? A. I was—it was four years ago.

Q. Yes, you said four years ago first. A. Let me go and figure it.

Q. How old are you now? A. Nineteen now.

Q. How old were you four years ago? A. Fifteen.

Q. You were fifteen? A. Yes, sir.

Q. And why did you tell the immigration authorities you were but twelve? A. My father told them, I didn't know.

By the Court.

Q. Did you know really what your age was? A. Yes.

Q. Did they ever tell you to tell it? A. He told me—he told them for me my age and I told him I was nineteen; I never knew before that I was nineteen until he told me.

Q. Who gave these pamphlets to Sternberg? A. I didn't see him.

Q. You didn't see him? A. No, sir.

Q. You were with Sternberg all the time and you never saw somebody give them to him? A. No, he was behind me.

Q. Well, did you know Sternberg had some pamphlets in his pocket when the sailor came? A. When I carried him up I saw it, he said so. That was the time I saw it.

Q. You didn't know it? A. No.

Q. You were with Sternberg all the time and you never knew he had any pamphlets in his pocket? A. No.

ALEXANDER BORENSTEIN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address, Mr. Borenstein? A. Business or home?

Q. Home? A. 545 West 164th street.

Q. What is your business address? A. 618 Broadway.

Q. Are you engaged in business with your father? A. Yes, sir.

Q. What is the name of his firm? A. N. H. Borenstein & Son, Inc.

Q. What is your business? A. Manufacturer of ladies' hats.

Q. Do you know the defendant Louis Sternberg? A. Yes, sir.

Q. How long have you known him? A. Since about four years.

Q. How many people do you employ? A. Well, at the present time of the year we employ 150, and other times about 75.

Q. During the four years Sternberg worked for you continually? A. Yes, sir.

Q. You have seen Sternberg around the place at various times? A. Yes, sir.

Q. You have heard him talk to other people around the place recently? A. Why no, not recently.

Q. How recently? A. Well, I have not been generally in the place until about two months.

Q. Before the two months, have you heard him talking around the place? A. Yes.

Q. Some of your people talk in English around your place? A. Yes.

Q. And some talk Yiddish? A. Yes.

Q. You talk English to some people? A. Some of them I do.

Q. And some you talk Yiddish to? A. Yes, sir.

Q. During all the four years that you knew the defendant Sternberg, and that he worked in that place, did you ever hear him talk English? A. Well, that is a difficult question to answer. I have foremen going around the place.

Q. I mean, did you ever hear him? A. No, I did not.

Q. Did you ever talk English to him? A. No.

Q. Did he ever talk English to you? A. No, sir.

Q. When I asked you during four years, I didn't mean all the time, I meant while you were there, you personally did not come in contact with him in front of Mr. Press here? A. I did not.

Q. You never spoke English to him all the four years he was there? A. No, sir.

Q. And he never spoke English to you? A. No, sir.

Q. When a man can talk broken English, he usually does it in your place, doesn't he? A. What is that?

The Court: He wants to know if he can talk English, if a man can, that they usually do talk it.

The Witness: Some of them try it.

Q. In other words, it is a habit, when a man is learning English, to talk it and practice it? A. Yes, they practice it.

Q. You never heard Sternberg even attempt to talk English? A. No, sir, I cannot say that.

Q. You mean to say that you have never heard him? A. Never heard him.

By the Court.

Q. Has he been employed steadily by your concern? A. He has been out of the place about a week now, he has not been down there recently.

Q. I mean until he was arrested? A. Yes, he was employed around the place, and he was always behaving himself in the past, for all that I knew of; he has always been down there all the time, and he is steadily there, for this reason: If they don't behave themselves very well, the natural thing is that we send them away.

By Mr. Weinberger.

Q. Do you know other people that know Sternberg? A. All my brothers know him, and my father knows him very well.

Q. Have you know him personally, too? A. Around the place, certainly.

Q. What is his reputation for truthfulness and honesty? A. He is a very clean boy, and I have known him to be an honest one; he behaved himself

around the place so far as I know. Outside I cannot say.

Q. His reputation so far as you know, from the people you know, is very good? A. Is good, and I never heard anything against him.

Cross-examination by Mr. Content.

Q. You say you could not positively say that he never talked English? A. I said when the attorney asked me——

Q. I didn't hear what you said, I don't want to trap you, but I just want to know what you said? A. I walk around the place a good deal, in and out of the place, and I hear them in conversation, and all I hear them conversing in is Jewish.

Q. Naturally you would, you having a lot of Hebrew employees, naturally they would talk in their Yiddish? A. Yes, sir.

Q. And as a matter of fact, you could not say positively that he does not talk in English, could you? A. That I am almost sure of, I never heard him talk English in my place.

Q. In your place. But you would not say that positively he does not talk some English? A. I don't know.

Redirect examination by Mr. Weinberger.

Q. A lot of your people there talk English, don't they? A. Well, there is quite a lot of them talk English.

Q. You never heard him talk anything but Yiddish? A. This particular man?

Q. Sternberg? A. No, sir.

Recross-examination by Mr. Content.

Q. The majority of your employees are Yiddish? A. Not the majority of them, but some of them talk English and some Jewish, there is the price committees, they settle prices, and they talk English.

By Mr. Weinberger.

Q. How many of the other people, about what percentage of the other people talk English, or broken English? A. I cannot tell.

MAX PRESS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address? A. 1200 Hoe avenue, Bronx.

Q. What is your business? A. Foreman.

Q. Foreman for whom? A. For N. H. Borenstein & Son.

Q. How long have you been foreman there? A. Six months.

Q. Do you know the defendant Louis Sternberg? A. Yes, sir.

Q. How long have you known him? A. For the time I am there, six months.

Q. And you have heard him talk around the place? A. Yes, sir.

Q. You have spoken to him yourself? A. Yes, sir.

Q. Did you ever hear him talk English? A. Never.

Q. Did you ever hear him say anything in English? A. Never.

Q. When you talked to him, did you talk Yiddish? A. Yiddish.

Q. When you heard anyone else talk to him they usually talked Yiddish? A. Yes, sir.

Q. Do you know people that know Sternberg, do you know a few people that know him in the factory or outside? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. I have known him as a good fellow.

Q. How is that? A. I know him as a good fellow in the place.

Q. You know him as a good fellow? A. Yes, sir.

Q. You never heard anyone say anything against him? A. Never.

Q. Did you ever see him outside the factory? A. No, sir, never.

Mr. Content: No questions.

SAM PELLISH, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address? A. I live in 49 Rutgers street.

Q. You know Louis Sternberg? A. Yes, sir.

Q. How long do you know him? A. Four years.

Q. Did you come over with him, too? A. No, sir.

Q. Did you know him in the old country? A. Yes, sir.

Q. How often have you met him in this country? A. Every day.

Q. You work in Henry Borenstein's factory there, too? A. No, sir.

Q. Where did you meet him, how did you come to know him? A. Where I go, in the same room.

Q. You live together? A. Yes, sir.

Q. In four years, did you ever hear him talk English? A. No, sir.

Q. Did you ever hear anybody talk English to him, and he answer in English? A. No, sir.

Q. Did you hear him talk even in broken English? A. No.

Q. Do you know other people who know him? A. Yes, sir.

Q. What is his reputation for truthfulness and honesty? A. He is a good fellow, does not bother anybody.

Q. Do you belong to any No-Conscription League? A. No.

Q. Do you belong to any association to oppose registration or conscription? A. No, sir,

Q. Are you an anarchist? A. No, sir.

Q. Did you take part in any movement against militarism? A. No, sir.

Q. Did you live with Sternberg for the entire four years? A. All the four years altogether.

Q. And you are positive that in those four years he has never spoken English? A. No, sir.

The Court: Make that answer, "Yes."

Cross-examination by Mr. Content.

Q. You speak English, though? A. Quite a bit.

ISIDORE SCHWARTZ, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. You talk English, Mr. Schwartz? A. Yes, sir.

Q. What is your address? A. 13 East Third street.

Q. Do you know the defendant Louis Sternberg? A. Yes, sir.

Q. How long have you known him? A. I have known him since he arrived from the other side.

Q. How often did you meet him? A. Every day in the year.

Q. Do you work in the same factory with him? A. No, sir, I have a restaurant, he comes in to eat.

Q. Have you ever heard him talk English? A. No, sir.

Q. Did you ever hear him say anything in your restaurant in English? A. No, sir.

Q. Did you ever hear him answer questions when they are asked in English? A. No, sir, he never asked any questions, he don't interfere with anything.

Q. Did you ever hear him discuss anything in English? A. No, sir.

Q. Or even any broken English? A. No, sir; not at all; he didn't try, never to speak a word of English.

Q. Never even tried? A. No, sir.

Q. Do you know other people who know him? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. Very fine, cannot be any finer reputation, it is a good, honest, nice employee, don't bother others, don't go out anywheres. I don't know what happened that he should have gone over there, he never goes out nights, or stays away from the place there. He eats his meal and then goes home, he don't try to go out never.

Q. Are you an anarchist? A. No, sir.

Q. Are you a member of the No-Conscription League? A. No, sir, I am a good citizen.

Q. Are you a member of any league opposed to militarism? A. No, sir.

Q. And so far as you know, is Sternberg? A. So far as I know, he is honest, sincere, that I know.

Q. You say you have known him for how many years? A. Four years.

Q. And he has always lived in that neighborhood? A. He did not live in that neighborhood, no, sir, he comes into my place for his meals.

Q. Where is your restaurant? A. 13 East 3rd street.

Q. During these four years he worked at Borenstein's, he was always eating in your restaurant? A. Yes, sir.

Cross-examination by Mr. Content.

Q. He is a good customer? A. A good customer, yes.

HYMAN SCHUNKLER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address, Mr. Schunkler? A. 49 Rutgers street.

Q. How long have you known the defendant Louis Sternberg? A. I know him from the old country.

Q. How often have you met him in this country? Did you meet him every day or every other day? A. Almost every day.

Q. You are in business for yourself? A. Yes, sir.

Q. Where is your place of business? A. 196 Clinton street.

Q. Where did you meet Louis Sternberg almost every day? A. He was coming to my place, the store.

Q. For what? A. Just personally, he is a friend of mine.

Q. Just dropped in to see you? A. Yes.

Q. During the four years and before that you knew him, did you ever hear him talk English? A. No, sir.

Q. Did you ever hear him answer questions in Yiddish when they were asked in English? A. I never heard him answer in English, only in Jewish.

Q. And some of the people that came into your store and would talk, they can talk English just as you do? A. Never heard him talk, no, sir, never talks any English.

Q. I cannot hear your answer. A. Never heard him talk any English, or them talk any English to him.

Q. I mean there is a lot of people around your place who do talk English? A. I don't talk much English either.

Q. But you never even heard Sternberg talk as much as you do, as much English as you are talking now? A. No, sir.

Q. You know of other people who know Sternberg? A. Yes, sir.

Q. What is his reputation? A. The best reputation that one can have.

Q. For honesty and truthfulness? A. He has a good, fine reputation.

Q. Ever known him to get in trouble of any kind? A. No.

Mr. Content: No questions.

SOLOMON WIDELANSKY, a witness called on behalf of the defendants, being first duly sworn, testified as follows (through official interpreter):

Direct examination by Mr. Weinberger.

Q. Where do you live? A. 79 Avenue C.

Q. What is your business? A. I am not working, I am making a living through my children.

Q. How did he say he makes his living? A. He is being supported by his children.

Q. How long have you known the defendant Louis Sternberg? A. Since he is in this country.

Q. Have you ever heard him talk English? A. Never.

Q. Did you ever hear him answer any questions that were asked in English? A. No.

Q. How often did you see him and where? A. He comes very often to my house, he is a countryman of mine.

Q. Have you ever heard him even talk in broken English? A. No, sir.

Q. Are you an anarchist? A. No, sir.

Q. Are you opposed to conscription? A. No, sir.

Q. Or militarism? A. No, my children registered.

Q. You are not a member of the No-Conscription League? A. No, sir, I am no member.

Q. You have not taken part in any proceedings against conscription? A. No, sir; I don't even know whether there was any meetings.

Q. Do you know a few people that know Mr. Sternberg? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. He is a fine, honest man, he often goes to synagogue.

Cross-examination by Mr. Content.

Q. How old are you? A. Fifty-two years.

Q. How long have you been in the United States? A. Twelve years.

Q. Are you a citizen? A. No.

Q. You do not speak any English? A. No, sir, I cannot.

Q. Did you ever try to learn English and to talk English? A. No, sir.

Q. You say that you never heard Sternberg speak any English? A. Never.

Q. If he spoke English, would you know he was speaking English? A. I never heard him talk English.

Q. If he spoke English, would you know it was English? A. Sure I would know.

By the First Juror.

Q. Can you write any language? A. I know how to sign my name in Hebrew.

By Mr. Content.

Q. Does he know how to write Yiddish? A. I also know how to sign my name.

Q. Ask him does he read Yiddish papers? A. I read in Yiddish papers.

CHARLES ZELKOWITCH, a witness called on behalf of the defendant, being first duly sworn, testified as follows (through official interpreter):

Direct examination by Mr. Weinberger.

Q. Have you given your address to the stenographer? A. 49 Rutgers street.

Q. Are you an anarchist? A. No, sir.

Q. Are you a member of any No-Conscription League? A. No, sir.

Q. Or anti-militarism league? A. No, sir.

Q. Or any league against registration? A. No, sir.

Q. Are you a member of any labor union? A. Yes, sir.

Q. Of what labor union are you a member? A. I am a tailor.

Q. How long have you known the defendant Louis Sternberg? A. He lives at my house, two and one half years, that is the time since I got married.

Q. You see him every day? A. I see him every night.

Q. You understand English a little bit yourself, don't you? A. No, I don't understand it.

Q. Did you ever hear Louis Sternberg talk English? A. No, sir.

Q. Did you ever hear Sternberg in the two years that he lived with you, talk English? A. No.

Q. Did you ever hear him talk in broken English? A. No, sir.

Q. Do you know other people who know Sternberg? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. The best that could be said.

Mr. Content: No cross-examination.

SAM GORDON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Gordon, do you know Louis Sternberg? A. Yes, sir.

Q. How long have you known him? A. About three or four years.

Q. How often did you meet him during those three or four years? A. Some weeks two or three times, other weeks one time or two times.

Q. Did you ever hear him talk English? A. No, sir.

Q. Did you ever hear him talk in broken English? A. No, sir.

Q. Did you ever hear him try to talk English? A. No.

Q. Are you an anarchist? A. No, sir.

Q. Nor a member of a No-Conscription League? A. No, sir.

Q. Are you opposed to militarism? A. No, sir.

Q. Are you a member of any organization against registration? A. No, sir.

Q. Have you ever taken part in any meetings? A. No, sir.

Q. Against conscription and registration? A. No, sir.

Q. You know other people, or a few people that know Louis Sternberg? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. Fine honest fellow, nice honest man.

Mr. Content: No questions. I will concede that the next witness will testify the same way.

Mr. Weinberger: The proposition is, as I understand it, that they are going to put on a great many witnesses on this, and if they fail on this, that the whole house of cards falls down.

DAVID PLATT, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address? A. 89 Avenue C.

Q. And do you know Louis Sternberg? A. Yes, sir.

Q. Are you an anarchist? A. No, sir.

Q. Are you a member of the No-Conscription League? A. No, sir.

Q. Are you a member of any organization against registration or militarism? A. No, sir.

Q. Did you take part in any meetings against registration or conscription? A. No, sir.

Q. How often a week do you meet Louis Sternberg? A. About three or four times a week.

Q. Did you work in the same factory with him? A. No, sir.

Q. Did you meet him after his work? A. Yes.

Q. Did you ever hear him talk English? A. Never did.

Q. You have heard him try to talk broken English? A. Never.

Q. Did you ever hear anybody talk English to him? A. No, sir.

Q. And he understand and answer in Yiddish? A. No, sir.

Q. You know other people that know him? A. Yes, sir.

Q. What is his reputation for honesty and truthfulness? A. Good.

Mr. Content: No questions.

LOUIS UDAH, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Weinberger.

Q. Where do you live, Mr. Udah? A. 230 Henry street.

Q. Do you know Louis Sternberg? A. Yes, sir.

Q. How long have you known him? A. About two years.

Q. How often do you meet him a week? A. A few times a week.

Q. Did you ever hear him—when was the last time you met him before his arrest? A. A few days before.

Q. Did you ever hear him talk English? A. No, sir.

Q. Did you ever hear him talk in broken English? A. No, sir.

Q. Did you ever hear anybody talk English to him and he answer in Yiddish? A. No, sir.

Q. Do you know other people that know him? A. Yes, sir.

Q. Do you know—what is his reputation for honesty and truthfulness? A. He is a very nice fellow.

Q. How about truthfulness, what is his reputation for truthfulness?

The Court: For truth telling, or telling the truth.

A. He is a very honest fellow, he is always telling the truth.

Q. Do you mean he is very honest and tells the truth? A. Yes, sir.

Cross-examination by Mr. Content.

Q. That is your opinion, that he is a very honest fellow? A. He is very honest.

Q. That is your opinion? A. Yes, sir.

Q. What is his reputation? A. He is a very honest fellow, that is it.

Redirect examination by Mr. Weinberger.

Q. What is his reputation for honesty, what do people say about him? A. He is a very nice fellow.

Q. What do they say about his honesty? A. He is very honest.

Q. What about his truthfulness—what do people say, if they say anything? A. They also say he is a very nice fellow.

Q. And truthful? A. Yes.

MORRIS BECKER, recalled.

Direct examination by Mr. Weinberger.

Q. All we want, Mr. Becker, is in reference to what happened as far as Sternberg is concerned in talking English in the police station. Will you tell us in your own way when you came to the police station, what happened? A. When I was there in the police station, in 57th street, I found the fellows and the girls standing there; and I was standing a few minutes there, and they started to search us and two hundred dollars in bills was found with Sternberg; and a copper said to him—I don't know the name of the copper or rather the sergeant—he said to him in English that he wants to take away the money from him, in order to have it safe, that nobody will steal it from him.

The fellow almost started to cry, tears came to his eyes, he didn't know that he is talking to him, what he wants to do with the money. The man that took the money asked every one of the fellows to explain to him in Jewish—I don't know what the words was—I don't want to talk Yiddish, I only want to talk English—but I answered for Sternberg, I told him, I explained to him I never talked Jewish, but I can make myself understood when I try to talk to some Jewish friends of mine. It is very hard for me to make him understand even Jewish, not to say anything about English. I can explain in Jewish to him, I can talk to him in Jewish, but I could not find the word in Jewish what I want, of what a receipt means, I don't know, and he didn't understand, and he still kept on referring to his money. I tell him that the receipt is right, that the money is good, I tell him that in Jewish. For five minutes then I was after explaining to him what a receipt was, and I could not find the Jewish word for receipt, I don't know what the Jewish word for receipt is to tell him, and I tell him, what I mean, but I could not get the word and I answered for him in the talk and so forth.

Q. What we want, Becker, is what happened in the police station. A. Yes, sir. Now, upstairs, we went there, and there was a lot of people there, and after we had been there awhile we came out and you know, I go before many Jewish people, and I never talk Jewish, I talk English, and if they forget I have to talk Jewish. I talk for this fellow, I want to explain how it was to that fellow. He said, "Now, do you understand that, how do you say it?" You understand English, don't you? I asked him in Jewish, I talked Jewish mostly with English words because I am accustomed to that, and in Russia they have to talk Russian, or Russian words, that is the way they make Jewish. But here I talked Jewish, with English words. I tell to him in such words as I can, and he ask me over every

time, and I have to discuss it with him, there is other fellows who do, but he don't seem to have it, he will talk with the other fellows and I will talk to him and I will tell him what it means, but he don't know, I have to explain it to him again in Jewish, but this word I cannot tell him what it means, and I think he understand what it means, and then brings it up again and every time I have to explain it over again to him in Jewish.

It is every time the same thing, we come out on together, he start explaining, wants me to explain, he don't know anything what is meant. And as to this trial, he don't know anything what it is, he don't know what it means, he don't understand.

And when he talk to the fellows, they explain to him all about it, but he don't understand. He always come to me and goes over it, and says he don't understand anything.

I cannot make myself understood in Jewish with him. That is the way it seems, he does not know English words and that is the way I talk Jewish, with English words, and he don't understand the English words, he absolutely understands no English at all, and I try to think of what this word is in Jewish that he will understand and I cannot talk it so that he will understand it. He cannot understand English, he does not know anything about English language and does not understand the English words.

Q. Did you hear him in jail talk English? A. No.

Q. Did you hear him in the court room talk English? A. No, never.

Q. Did you hear him before the Commissioner talk English? A. No.

Q. Has he spoken English here? A. No, sir, on the floor when they took the registration cards it was nothing but Jewish.

Q. Who was the conversation had between? A. Who?

Q. Yes. A. I was locked up in my cell, I don't know; I was standing on the corner of my cell, and I heard them talking to him, I heard one of these little fellows talking to him about how it is in Jewish—he is one of those fellows there that talks Yiddish—and when they started to talk to him they got an interpreter and talked to him, and I think they took him upstairs somewhere, and they talked in Jewish, and I cannot tell what that man was saying to him in Jewish, but I heard part of the conversation in Jewish.

Q. That is, in reference to registration? A. Yes.

Q. You heard the questions asked of Sternberg, and you heard Sternberg answer the questions? A. Absolutely, in Jewish.

Q. Did you ever see Sternberg before you saw him in the police station? A. I never seen him.

Cross-examination by Mr. Content.

Q. Did you say that you and he were not talking in English in the Commissioner's room Saturday a week ago, in English? A. In English?

Q. In English? A. If I spoke to him in English, then he never answered me; I told you that he spoke to no one in English.

Q. I ask you did you not speak to him in English when you were before the United States Commissioner? A. I never spoke to him in there—if I spoke to him in there, in the Commissioner's room, he never answered me if I spoke in English. I told you he spoke in English to no one that I ever heard.

Q. Yes, I know, we have had that explained by you, but I asked you one question and it is a simple one, and I ask that you answer the question. A. If I spoke to him he did not answer; he did not understand me.

JOSEPH WALKER, recalled, and having been previously sworn, further testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Walker, you did not know the defendant Sternberg before his arrest? A. No, sir.

Q. Never saw him before? A. No, sir, never saw him.

Q. Did you see him in the police station that night?

Mr. Content: That was all gone over.

Q. In the Night Court? A. Yes.

Q. Did you see defendant Sternberg there? A. Yes, sir.

Q. And did you hear defendant Sternberg talk English? A. He spoke no English.

Q. Did you hear anybody talk any English and he answer in Jewish? A. He spoke no English to my recollection.

Q. And when they asked for his pedigree did he give his pedigree in English? A. I don't think so, I doubt it; I was sitting down when that was taking place; I was sitting on the bench, but I think he gave it in Yiddish.

Q. Have you been in his cell in the Tombs? A. Where we are at, yes; I am with him now.

Q. In the same cell? A. In the same cell.

Q. How many days have you been there? A. About ten or eleven days.

Q. Have you ever heard him talk English in those ten or eleven days? A. No, he spoke absolutely no English.

Q. You have to talk to him in Yiddish? A. I make the best of it I can.

Q. You were born in this country, weren't you, Mr. Walker? A. Born in St. Louis.

Q. You ordinarily talk English only? A. Yes; I speak a little Yiddish.

Q. You speak a little Yiddish? A. A little Jewish.

Q. And before the Commissioner did you hear Sternberg talk English? A. I would not say for sure; to be positive I would not say.

Q. Where were you? A. Seems to me I was sitting right next to Sternberg at that time.

Q. Did you hear him talk English? A. I don't think I have; I doubt it.

Cross-examination by Mr. Content.

Q. You speak Yiddish? A. A little bit.

Q. Where did you learn it? A. Well, I learned most of it in New York; I have been in Franklin, England, over thirteen years—about twelve years.

Q. Are you of the Jewish race? A. No.

Q. You are not? A. No, I am not.

Q. But you speak Yiddish? A. Yes, I speak a little of it; I speak Spanish very well.

Q. Did you hear Sternberg speak any English at all? A. I never heard him speak any, except to say water or something like that.

Q. Didn't you tell me when you came to see me in my room that he spoke a little broken English? A. Well, he can understand it.

Q. I asked you a question and you can answer that question, whether you told me that. A. I told you that he could not express himself in the English language.

By the Court.

Q. The question is whether you told Mr. Content that Sternberg could speak a little broken English. Did you tell Mr. Content that? A. Well—if he spoke it?

By Mr. Content.

Q. I didn't ask you that. Did you tell me that, yes or no? A. I did not, no.

Redirect examination by Mr. Weinberger.

Q. Has anybody said anything to you, Mr. Walker, that if you gave testimony against the other three that you would get off easy? A. I don't think it was anyone with the exception of Mr.—I think Mr. Content said something to me to that effect.

Q. And did anybody—how many times have you been taken out of the Tombs and brought over here? A. I must have been brought out about four times.

Q. And questioned? A. Three or four times.

Q. Any of the officers say anything to you about you better testify? A. What officer do you mean: policemen?

Q. Any officer? A. No.

Q. Was there anything told you about if you took the stand against the other three you would get off easier? A. Yes, according to Mr. Content.

Recross-examination by Mr. Content.

Q. You wrote me a letter, didn't you? A. Yes.

Q. I never spoke to you before I got that letter, did I? You wrote to me protesting against your treatment, is that correct? A. Yes.

Q. And I sent for you in pursuance to your letter, is that correct? A. You did.

Q. Didn't I tell you so when you were brought in, that I only sent for you because you wrote that letter? A. Yes, sir.

Q. You wrote a similar letter to Commissioner Hitchcock, didn't you? A. Yes, certainly.

Q. Didn't I tell you at the very outset that I would not have sent for you but for the fact that you sent that letter to me? A. Yes, sir.

Q. Stand up (addressing one of the Deputy Marshals). Was this Deputy Marshal in the room at all times when you were there? A. Yes, sir.

Q. Was I ever in that room with you alone for one moment? A. No.

Q. Didn't I call into that room the witness Henry who testified that you gave out hand bills? A. Yes.

Q. Didn't I allow you to question him to show that your treatment was fair? A. Yes, sir.

Q. And didn't Henry say to you in your presence positively that you gave out hand bills and leaflets? A. Yes, sir.

Q. And you had an opportunity to question him, didn't you? A. I did.

Q. You were sent for the following day again at your request, weren't you? A. Yes, sir.

Q. Didn't you tell me you wanted to come again? A. Well, you broached it to me.

Q. What? A. Didn't you broach it to me?

Q. Didn't you tell me you wanted to come and talk it over again? You told me you were very nervous that day. A. Yes, so I am.

Q. And I told you to go back to the Tombs and to calmly think it over and calm yourself, didn't I tell you to do that? A. Very well.

Q. And I told you if you wanted to be brought down the next day I would arrange it, is that correct? A. Yes, sir.

Q. And you were taken down again, brought down again, because you asked it? A. Yes.

Q. And was it on the second day that you were there that the soldier was there and I gave you an opportunity to talk to him? A. Yes.

Q. Is that correct? A. Yes, sir.

Q. I told you that the first thing when you called on the following day, that the men were there who would testify against you and you could talk to them; is that correct? A. Yes, sir.

Q. You had an opportunity of doing that? A. Yes, sir.

Q. Did I make any threats to you of any sort? A. Well, no, I cannot say so, but I was intimidated.

Q. Did I raise my voice to you at any time in my room? A. No.

Q. Did I make any promise to you of any sort? A. No.

By Mr. Weinberger.

Q. Mr. Walker, you told Mr. Content, as he just stated, that you were very nervous when you were telling him things? A. Yes, I am troubled with neurasthenia, that is right.

Q. You are troubled with neurasthenia, you have been scared ever since you have been arrested, haven't you? A. Yes, I have been frightened since I have been arrested.

Q. I want to say anything I ask is not any reflection on Mr. Content; he did not mean to give the impression of that sort, but the fact is that this man has been scared ever since he has been arrested. A. I have never been in the Tombs before.

Mr. Weinberger: I want to state on the record, if the Court please, that anything I am bringing out now is not intended in any way as a reflection on Mr. Content.

Mr. Content: Don't say it then.

Mr. Weinberger: That is, this man is nervous and scared ever since I have seen him in the case.

Mr. Content: Is Mr. Weinberger testifying?

Mr. Weinberger: No, no, no.

Mr. Content: You are making the statement that he was nervous and he said he was.

Mr. Weinberger: I want to have it on the record, I am not casting any reflection on the record.

Mr. Content: I don't want the concession; if you have any reflections to cast, cast them.

The Court: The point is this, the man may be scared if he is arrested, and I should imagine that coming to trial a man might be in that condition of mind, but the only

relevancy here is not his own notions and feelings, but whether or not anything has been said to him by any of the officials, either to induce him to testify falsely to save himself or for any similar purpose, that is all.

LOUIS KRAMER, one of the defendants, being called as a witness in behalf of the defendants and first duly affirmed, testified as follows:

Direct examination by Mr. Weinberger.

Q. What is your address, Mr. Kramer? A. I am living at 208 Second Avenue, I am paying rent there, but my permanent address where I receive all mail and where things are taken care of is at 132 St. Mark's Place, care of Dr. Glassberg.

Q. Are you an anarchist? A. I am.

Q. What do you understand anarchism to mean? A. Philosophy of a new social order based upon the understanding that all governments are unnecessary and police forces are unnecessary, judges, district attorneys, armies and navies are unnecessary, a society where each, according to his needs, each according to his ability has.

Q. Do you believe in forcing the overthrowing of governments by force? I mean physical force, dynamite and arms? A. All governments, as I understand, and from what I conception I understand and hold in regard to governments, is based fundamentally upon coercion, physical force, violence.

Q. Do you believe whether or not any government should be overthrown—you may say whether or not you believe any government should be overthrown by the use of force? A. Let me put the answer in the words of one of the greatest men as to what extent force may be applied——

The Court: No, you cannot do that, you may answer the question.

Q. Do you believe in overthrowing governments by physical force? A. I do not. I believe in intellectual——

The Court: That is enough. You do not.

Q. Do you believe in militarism? A. I do not.

Q. Do you believe in an army and navy? A. I do not.

Q. Do you believe in taking part in war? A. I do not. To the point of death I will not take part.

Q. Do you believe in taking part in war on behalf of one government against another? A. I do not.

Q. Do you believe in taking part directly or indirectly with military arm of the government? A. I do not.

Q. Do you believe in taking any part with the militia? A. I do not.

Q. Would you be conscripted? A. I would not. I would go against the wall before I would be conscripted.

Q. Have you registered? A. I have not.

Q. Are you a member of the No-Conscription League? A. I am.

Q. Have you personally told anyone not to register? A. I have not.

Q. Have you agreed with anyone not to advise people to register? A. I have not.

Q. On the 31st day of May, 1917, did you go to Madison Square Garden with any other people? A. I did not.

Q. Did you go there in pursuance to any agreement to tell people not to register? A. I did not.

Q. Why did you go to Madison Square Garden meeting? A. On the night of May 31st, knowing that there was to be a peace meeting, a meeting held for democracy, and being a meeting to be held the night before registration, I thought, it being on the eve before registration, I went to the meeting in Madison Square Garden on May 31st with the

object to or intention of distributing the leaflets which were advertising our No-Conscription League on June the 4th, on the eve of June the 4th. I started out about seven thirty and I reached the Square about a quarter to eight, the Madison Square Garden. The line was so dense, so thickly populated at that time it was impossible to get near the door. Having this bundle of leaflets I went to the stage entrance and tried to gain admittance, which I tried with no success and I stood in line when coming in, in an orderly manner, speaking to no one, meeting no one that I knew, going to the second balcony because of the enormous and stupendous size of the crowd outside, they were starting them to go upstairs. Seating myself directly opposite from the platform of the speakers, I seated myself in the second row from the back and up until about nine thirty or a quarter of ten, to be as correct as possible, I remained in that seat. I want to emphasize that the place where I was sitting was the second row from the rear. Getting up about nine forty-five, I left my seat, took my bundle of papers in my arm, and started on out. Changing my mind I went back to my seat, and remained there until about ten twenty-five. As I was on my way out, this bundle of four or five—what I want to express here is this: Whatever I have done I consciously want to admit it. I did give four or five leaflets to one, and I was not cognizant, I was not aware at the time that it was Walker, but I had never met Walker before and I handed these four or five to him there on my way out, when Sergeant Silverman and four or five men, all in uniform, rushed over to me and grabbed me by the collar, shouting out, "You are under arrest." Well, I am intelligent enough to know that when I am under arrest, to go along in an orderly way, but I demanded to know why I was under arrest. I asked, "Have you a warrant?" Starting right

downstairs with the men in uniform, Officer Finan went over to them—this was on the ground floor—and said, "I am from Central Office, here is my shield, I will take care of this man." I want to impress this one particular fact, that all of this time I did not utter a word to anyone in that mass or huge audience. While standing there Officer Silverman and the rest of the officers, not in anyway to cast reflection upon the characters of any of these men who have testified against me, but the most violent and the most abusive language was used to me, and I understand that a man is innocent here, regardless of other thoughts until proven guilty. I did not answer them. I held my tongue, knowing that silence is more powerful than expression sometimes, so I remained silent there. Then the prisoner Walker was brought over. I cannot recall who brought Walker over and the prisoner Sternberg. We went down at that time and were held, I believe, near 31st Street for a half hour or more.

In my remarks—in regard to my remarks, "if you don't leave me go, I will call my bunch," what I said, "Don't use any violence on me," because in the past I have been very much interested in labor and I have taken a very active part in directing their law suits and so forth, and I know their methods which they employ with the underdog as it is called in society, and I knew what I may expect; and I knew what was coming, therefore I kept silent. But I did say I didn't want to appear contradictory in my statement, I did say that if you use any violence I will call my crowd irregardless of the fact that the man is in uniform or without uniform, if a man uses violence against me I must protect myself. They took us outside and held us there. A patrol wagon was called. We were taken to the 57th Street station. There when asked if I had anything to say I told them, I refused to answer any questions until my attorney

appears here. The next morning we were brought before Magistrate—I cannot recall the name—but we were held there.

Mr. Content: Magistrate McQuade, was it?

The Witness: I don't know his name.

A. (Continuing) We were bound over to the Federal authorities, held in $500 bail; we were turned over to the Federal authorities, Mr. Content appeared in the Court before Mr. Hitchcock and turned us over to the Federal authorities holding us in $5,000 bail.

Q. Had you ever seen Detective Finan before? A. I had.

Q. Where? A. At several of the radical meetings and labor meetings.

Q. You know his face, do you? A. I do.

Q. Did you talk to him that night in Madison Square Garden? A. I did not.

Q. Did you say to him, "Are you going to enlist"? Did you say to Officer Finan, "Are you going to enlist"? A. I stated in my statement that I talked to no one that whole evening there. Meeting Mr. Finan at the time of the arrest was the only time that I had seen Mr. Finan.

Q. I know, and understood that you did not talk to anyone, but I want to call your specific attention just the same to the various things. Did you say, "Are you going to enlist" and he answered "yes," and then you said, "If you take our advice you will not enroll, if you will keep away from there there is not enough soldiers or police to make us go; if some of us go we will all have to go." Did you use any such language to him?

The Court: Say yes or no.

Q. (Continued) Mr. Kramer, answer. A. Well, let me——

Q. Yes or no. A. It is a physical impossibility; I was not near the man.

Q. Did you see Becker at that meeting? A. At the time of the arrest I had not—you mean then?

Q. I mean before? A. I did not.

Q. Were you at any time with Becker, Walker and Sternberg up in the balcony? A. At no time during the meeting.

Q. And you and Becker gave out pamphlets and directed people to the different parts, where they should go? A. I cannot consent to Becker being dragged into this, and therefore I must say no.

Q. Did you ever see Sternberg before his arrest? A. I never have.

Q. Did you ever see Walker before his arrest? A. I never have.

Q. I mean on that day, directly or indirectly? A. I did not.

Q. What did you go to this meeting for? A. I went there for the specific object of distributing these leaflets and advertising our no-conscription meeting and also to listen to the speakers.

Q. Did you give out Exhibit 2? A. I did not, I was not aware of Exhibit 2 being there. I brought along Exhibit 1.

Q. Where did Exhibit 2 come from? A. Where did Exhibit 2 come from? I do not know.

Q. Did you hand out any leaflets at all? A. The four or five that I handed to Walker at the time, not knowing who Walker was.

Q. Did you hand any out before you were arrested? A. Did I hand out any before I was arrested?

Q. Yes. A. Why, at the time of my arrest, I was on my way out.

Q. Were you giving them out on your way out? A. The four or five that I gave to Walker.

Q. Where did you give them to him? A. Down near the stairway on the second balcony.

Q. Did you give any to anyone else? A. I did.

Q. Where did you give them to Walker? A. Standing near the stairway, as I was on my way out he happened to be standing there.

Q. You saw Officer Silverman there? A. I did not.

Q. Sergeant Silverman? A. I did not.

Q. Did you say to anyone, "Are you going to enroll"? That is here on page No. 21 of Sergeant Silverman's testimony: "Are you going to enroll next Tuesday," and not knowing what Detective Finan's answer was, you added, "Well, the authorities cannot do anything to you, if you don't; the law is unconstitutional, and if you go in there and resist them, they cannot do anything to you. We will be behind you." A. I did not speak to one specific soul during my whole stay in that building.

Q. You say you have seen Detective Finan around at various radical meetings? A. I did.

Q. What kinds, for instance? A. For instance, I have seen him at meetings on 4th Street.

Q. Where? A. On 4th Street and Second Avenue.

Q. Where else? A. I have seen him at various different meetings at the Harlem Casino.

Q. You knew him to be a detective? A. Did I know him to be a detective?

Q. Yes. A. By knowledge I have of human psychology, yes.

Q. No, did you know him to be a detective? A. Did I know him to be a detective?

Q. Yes. A. I didn't know it, not so far as recognition of the man is concerned; but I did from my own judgment.

Q. So that before Madison Square Garden meeting you were of the opinion that Detective Finan was a detective? A. I was.

Q. And you are positive that you did not talk to him at the Madison Square Garden, are you? A. Positive, positive.

Q. Were you arrested before Walker and Sternberg? A. I was.

Q. Were you brought downstairs? A. I was.

Q. And they were later—Walker and Sternberg were later brought to you where you were? A. Yes, sir.

Q. Did you hear Sternberg say to Walker—let me ask you first, do you talk Yiddish? A. Oh, I speak Jewish; but it is rather in a small sort of petty way, though.

Q. You understand it, do you? A. Slightly.

Q. Did you hear Sternberg at any time talk Jewish? A. Why, when Sternberg was brought down?

Q. Yes or no. A. No, I did not.

Q. At any time? A. No, I did not.

Q. When Sternberg was brought down did he say to Walker, "Did they get any circulars?" and then Walker is alleged to have said, "Yes, got everything I had." And then Sternberg answered in broken English, "Did they get anything on you?" And then Sternberg said to Walker, "Did they overhear any of your conversation regarding instructing the men not to register next Tuesday?" Walker said, "I guess there is a few detectives in that building, and they must have overheard us." Do you remember them saying any such thing? A. I did not.

Q. Was Walker brought down before Sternberg? A. He was.

Q. And then Sternberg was brought in? A. Yes, sir.

Q. And the three of you were together under arrest? A. Yes, sir.

Q. Within a foot of each other or less? A. Why, we were right close together, we were, there.

Q. And if any such conversation would have taken place you would have heard it? A. I would.

Q. Did you use any such expression to Sternberg, "Did they get any of the stuff on you?"? A. I did not.

Q. You have been in the same cell with Sternberg, have you, at times? A. I have not.

Q. In court, in the Police Court, did you hear Sternberg talk English? A. I did not.

Q. Did you hear him give his pedigree in English? A. I did not.

Q. Did you hear him answer questions in Jewish that were asked in English? A. I did not.

Q. Did you hear him before Commissioner Hitchcock talk English? A. No; when Commissioner Hitchcock would ask questions, someone sitting alongside of Sternberg would translate—would inform Sternberg—would in turn put them to Sternberg and Sternberg would answer in Jewish.

Q. Do you know whether the man who was doing the interpreting was Harry Goidel, an attorney? A. I do.

Q. Have you had any agreement to go out and tell people not to register? A. I have not no agreement; I don't believe in coercion.

Q. Now, the No-Conscription League was merely opposed to Conscription? A. It was.

Q. And that was the only agreement of the No-Conscription League? A. It was.

Q. Now, did you hear Sergeant Silverman at the alleged conversation between Sternberg and Walker about having the stuff and telling men not to register and whether detectives—that there was detectives in that building and they must have heard? And did he say this to Sternberg and Walker: "Boys, just as a little favor, a little silent tip; the less you say now the less will be used against you"? A. No, but what Sergeant Silverman did say was that if this was in another country "you would be shot down like dogs."

Cross-examination by Mr. Content.

Q. Mr. Kramer, how old are you? A. I am twenty-two.

Q. You are twenty-two years old, is that correct? A. I am.

Q. Where were you born? A. Mr. Content, I have refused to register; when I stand trial I shall answer those questions.

Q. I asked you where you were born?

Mr. Weinberger: Wait a minute; please answer the question.

Q. You are advised by the Court that you may refuse to answer any question on the ground that the question tends to incriminate or degrade you. Therefore, I say to you that the answer to my question as to where you were born will not tend to incriminate or degrade you. A. It is immaterial.

Q. Well, where were you born? A. I was born in Russia.

Q. When did you come to the United States? A. 1894.

Q. Are you a citizen of the United States? A. I am a citizen of the world.

Q. Are you a citizen of the United States? A. I am a citizen of the world.

Q. Have you taken out naturalization papers in the United States? A. I have not.

Q. You do not recognize any allegiance to the United States Government, do you? A. I recognize allegiance to no country and to no nation.

Q. Are you opposed to the Government of the United States, yes or no? A. I am opposed to all governments.

Q. Answer my question yes or no. A. I cannot; I am answering to the best of my information.

Q. Answer my question yes or no, I am not interested in anything else but just this.

Mr. Weinberger: I submit that he is answering.

The Court: Objection overruled.

Mr. Content: I am entitled to have an answer to that question.

Mr. Weinberger: Exception.

The Court: Answer the question.

Q. Are you opposed—I don't care about other nations—are you opposed to the Government of the United States, yes or no? A. In answering you, if your Honor will permit me to say so, I am opposed to all governments which would not discriminate but take in——

Q. I ask you again, are you opposed to the Government of the United States, yes or no? A. I am opposed to all governments.

Q. Does it include the Government of the United States? A. It does, all governments.

Q. It would? A. Yes, sir.

Q. You do not recognize the authority of the law, do you? A. I recognize the ethical authority, not the legal authority.

Q. Now, if you don't like a law that the Congress of the United States has passed, and to which the President has affixed his signature, you feel yourself privileged to disobey it, do you? A. I feel myself privileged, I believe——

Q. Answer my question; do you feel yourself privileged to disobey any law of the United States that you do not care to obey? A. If it states that I should murder, I feel that I should disobey it, yes.

Q. Whenever you don't like a law of the United States you feel yourself at liberty to disobey it, don't you? A. Where it interferes with human rights.

Q. Did you make any remarks about the President of the United States on the evening of May 31st? A. I did not speak to anyone in the world.

Q. Spoke to no one; you kept silent? A. I did.

Q. Did you see anyone else in the Madison Square Garden giving out pamphlets? A. Did I?

Q. Yes. A. Why, no; I was more interested in the speeches myself.

Q. Did you see anyone giving out pamphlets? A. I did not.

Q. You say that you only gave directly three or four? A. Three or four.

Q. And with that physical fact or explanation, can you explain to us how these pamphlets were all found in Madison Square Garden? Have you any means of explaining that to us? A. Why, there may have been many of these individuals that would have brought the pamphlets for distribution, not to my knowledge.

Q. You did not see anyone distribute them? A. I did not.

Q. Mr. Kramer, you said that you only had these leaflets announcing the meeting. Do you know where these pamphlets came from, of the type of Government's Exhibit 2? A. I am aware of the Exhibit No. 2; I am fully conscious of what it is, yes.

Q. Have you seen it before? A. I have never seen it at Madison Square Garden.

Q. Never saw any of these? A. I have seen them, but not at Madison Square Garden, no, sir.

Q. You believe in the principles announced by that pamphlet? A. Do I believe in the principles that are here announced?

Q. Yes. A. I believe in the principles of anything that stands for human rights.

Q. Wait a moment. Wait. Do you believe in the principles announced in that pamphlet, Government's Exhibit No. 2, with which you are familiar? A. I am a believer in the principles?

Q. Yes. A. Well, where I am concerned, yes.

Q. It is the purpose of your League to resist Conscription, isn't it? A. The purpose of our League is to resist Conscription mentally; it is our——

Q. What is that? A. Mentally, yes.

Q. If you were forcibly taken with the army, would you resist by force? A. Would I resist by force?

Q. Yes. A. No, I would allow them to run me against the wall and shoot me before I would shoot my fellow men.

Q. Well, now, Mr. Kramer, you testified on direct examination that you gave three or four pamphlets to Walker. Is that correct that you gave three or four pamphlets or leaflets that you referred to, to Walker? A. I did.

Q. I want to call your attention to your testimony before the Commissioner in response to a question of your counsel, Mr. Weinberger, at page 46: "Did you ever see them"—meaning Sternberg and Walker—"at any meetings of yours before? A. I never have. Q. Did you give them any pamphlets? A. Not to my knowledge." And today you have testified you did give them to Walker? A. I did give them to Walker?

Q. Yes. A. I believe, Mr. Content, at that hearing I expressed the words that I gave some pamphlets as near as my knowledge was concerned.

Q. I will read the questions and answers to you so there will be no mistake. This is the examination by your counsel, Mr. Weinberger, referring to Sternberg and Walker: "Q. Did you give them any pamphlets? A. Not to my knowledge." Did you make that answer to that question? A. Did I make that answer?

Q. That answer to that question? A. I think in answer to that question I rather stated I gave them to Walker as the man who stood there after the arrest and not before the arrest.

Q. After the arrest? A. I am not cognizant of giving them to Walker as the man who stood there.

Q. Were you not cognizant of that same fact when you were before United States Commissioner Hitchcock? A. I was not.

Q. When did you just discover that it was Walker that you had given them to? A. When did I discover it?

Q. Yes. A. After I spoke to Walker.

Q. Wasn't it after you heard Walker testify in this court for this first time that you made up your mind to admit that? A. It was not.

By the Court.

Q. You first discovered it when? The night of the arrest? A. The night of the arrest?

Q. Yes. A. No, after the first hearing.

Q. You knew you had given it to somebody, didn't you? A. I knew I had given it to someone.

Q. You understand my question, you knew you had given these pamphlets to some gentleman? A. Yes.

Q. Very good. Now, you and Walker with the others were arraigned that night in the Police Court, weren't you? A. We were.

Q. Didn't you know then to whom you gave the pamphlets? A. Why, no. You know in such a moment as that, there is a disturbance and we see lots of people.

Q. You didn't know it? A. I didn't know at that particular moment, there was many people there all around.

Q. You went before the Commissioner, and according to the minutes you said in effect, that you did not give any pamphlets to Walker? A. As near as I can remember, according to my knowledge, it is after the hearing before Commissioner Hitchcock.

Mr. Weinberger: The testimony is: "Did you give them any pamphlets? A. Not to my knowledge."

Mr. Content: That is the question and answer which I have read three or four times.

By Mr. Content.

Q. In this trial is the first time that you said you gave them to Walker, isn't it? A. It is.

Q. There is no misunderstanding, is there, you meant before the Commissioner to answer that you could not say that you did not have the knowledge to say that you had given them? A. I wanted Commissioner Hitchcock to understand that at that time, that particular time, I could not specify the individual that I gave them to.

Mr. Content: Continuing to read further along on page 46: "And they had nothing to do with the giving out"—referring to Sternberg and Walker. "Q. And they had nothing to do with the giving out of these pamphlets? A. They had absolutely nothing to do with it. Q. You are absolutely positive of that? A. I am. Q. You don't know anything about these men"—referring to Walker and Sternberg—"being opposed to Conscription? A. I don't. I am aware of nothing about their opinions." That is still your testimony?

The Witness: Yes.

Q. Was there any general distribution of pamphlets? A. Was there any general distribution?

Q. Yes. A. Why, I don't know.

Q. That you noticed or that you saw? A. That I saw, no, I came there alone and came out alone.

Q. And you say that Walker is the only person that you gave any to? A. No.

Q. Now, you had? A. Yes.

Q. Will you permit me to read something of your answer on cross-examination by me before Commissioner Hitchcock: "Q. Is it true that you and Becker were giving out pamphlets in the Garden? A. We were. Q. You were? A. I had the bundle under my arm at the time of my arrest. Q. Before your arrest did you give any pamphlets to anyone? A. Not to one single individual. Q. I ask you have you given pamphlets to anyone? A. There was a distribution. Q. Let me ask you this

question, and I mean it to be a fair question: Did you give any number of pamphlets to any one person or one to each person? A. One to each person." A. Have I in any way refused the statement that I may have given them out? What I said in direct question, too, was I had given anyone, and as near as I can understand that question, what is trying to be brought out by the construction of it is that any one particular man——

Q. Never mind the legal aspect of it. Answer my question. I ask you this question, I asked you whether you gave a number of pamphlets to any one person? You heard Finan's testimony that you and Becker were giving a number to different people, you heard that before the Commissioner and here, didn't you? A. I did.

Q. After that testimony I asked you whether you gave a bundle of pamphlets to anyone, that is, more than one to one person?

Mr. Weinberger: Oh, no, that is not a definition of a bundle.

Mr. Content: I didn't mean a bundle, I meant more than one.

Mr. Weinberger: That is what is in your question.

Q. "Q. Let me ask you this question, and I mean it to be a fair question: Did you give any number of pamphlets to any one person or only one to each person?" And you answered that: "One to each person." Is that correct? A. How could it have been possible——

Q. Never mind now arguing how it could be done, did you make that answer? A. It is not correct.

Q. It is not correct? A. No.

The Court: The question that was read and your answer to the Commissioner.

Mr. Content: It was before the Commissioner and to me.

The Witness: Words to that effect, no, because it would have been a physical impossibility.

Q. Never mind that. Is the record wrong then? A. Yes, the record is wrong.

Mr. Weinberger: Read the next question and it will show you that it is wrong.

Q. "Q. Never gave any bundle to anyone at any time? A. No, I did not." Did you say that? A. Did I say what?

Q. Now, I asked you this, whether you—I will read you this question again: "Q. Let me ask you this question, and I mean it to be a fair question: Did you give any number of pamphlets to any"—and a number to mean more than one— A. Oh, sure.

Q. It means more than one and——

Mr. Weinberger: I object to the form of the question and I ask Mr. Content to read it all.

Mr. Content: It is an intelligent question.

The Court: Objection overruled.

Mr. Weinberger: Exception.

Q. "Did you give any number of pamphlets to any one person or one to each person?" You understand the question as I have pointed it out? A. Yes.

Q. In other words, does it convey to your mind a distinction between giving more than one to one person or giving out one at a time? Do you understand me? A. I should say so.

Q. Did you make this answer: "A. One to each person"? A. I did not.

Q. All right, you say you didn't. You, to-day, have said that you say you gave three or four to Walker? A. As I was going out; but according to my knowledge I expressed before Commissioner

Hitchcock that I was not aware that it was Walker.

Q. Now, the man you now know to be Walker, you say you gave four or five to? A. Yes, sir.

Q. Why did you give him four or five? A. Why?

Q. Yes. A. Well, as a general rule, when I go to a meeting and I know it is forbidden to give out pamphlets and I am warned by the authorities, I abide by that rule; but as a general rule when going out one happens to be in a different state of mind, and not aware of what I am doing, I done it, in a moment of not being aware of it.

Q. Since you don't know what you were doing, I won't ask you anything more.

By Mr. Weinberger.

Q. The next question, the one I wanted Mr. Content to read to show the continuity of this, is this question: "Q. You never gave any bundle to anyone at this time?" And your answer is: "A. No, I did not." You still insist you did not give any bundle out? A. Yes.

The Court: Let me see the package that is in evidence as having been taken from the witness.

(Same handed to the Court.)

By the Court.

Q. Now, Mr. Kramer, Government's Exhibit No. 3 is a package of papers that the testimony shows was taken from you. Do you say it was taken? A. Government's Exhibit 2?

Q. No, no. Did you have this bundle, this is called Government's Exhibit No. 3, and do you say that this was taken from you or wasn't it? A. Not that bundle, no.

Q. This was not taken from you? A. No, that was not taken from me. I had nothing but a leaflet advertising No-Construction meeting.

Q. Well, then you flatly contradict the testimony of the Government's witnesses in that regard, is that it? A. I certainly do, your Honor.

Q. And you say that you did not have in your possession that night any of Government's Exhibit No. 2? A. I did not.

Q. And that the testimony that No. 2 Exhibit were found with No. 1 in your possession, on your person, is not true? Yes or no. A. Well, now, I want to make this clear. I want to have that question to be explicit.

Q. My question is whether the testimony to the effect there were found on your person or in your possession circulars, both known as Government's Exhibit 1 and Government's Exhibit 2, whether that testimony was correct or incorrect? A. Will you hold up Exhibit 2 for me?

Q. Yes, here it is, Exhibit 2, you can look at it yourself (handing same to witness). A. No, it was not found on me; Exhibit 1 was found on me.

Q. How many of Exhibit 1 were found? A. How many?

Q. Yes. A. Well, I should judge about from 150 to 200.

Q. Let me ask you, you have seen Exhibit No. 2 before the night of the Madison Square meeting, haven't you? A. Yes.

Q. Where did you see it? A. Where have I seen them?

Q. Yes. A. Well, I have seen them in various, different places.

Q. Well, give us some. A. I have seen them out on the street, I have seen them at lectures, at meetings.

Q. Well, anywhere else? A. No.

Q. Did you ever see them at 20 East 125th Street? A. Have I ever seen them at 20 East 125th Street?

Q. Yes. A. When I went there it was not my business to search the papers.

Q. I asked you whether you had ever seen these there? A. No.

Q. You never did see them there? A. I never did.

Q. What is 20 East 125th Street? A. What is it?

Q. Yes. A. It is a literature place.

Q. A literature place? A. Quite a publishing place.

Q. Isn't it the headquarters of the No-Conscription League, or one of its offices? A. It may be one of its branch offices.

Q. Well, don't you know? A. Why, no, I know very little about it.

Q. Have you been there? A. Have I been there?

Q. Yes. A. Yes.

Q. How often? A. Oh, about three different meetings.

Q. And you don't know what the place is? A. I believe, your Honor, I have just told you that it was a publishing place and a literature place.

Q. I mean in connection with the No-Conscription League? A. I have admitted to you that it was the No-Conscription League that met there.

Q. Well, do they have an office, or what is it? A. They have books up there that they sell.

Q. Have they a room there? A. Yes, they have a room there.

Q. And did you see this Exhibit No. 2 there? A. No.

Q. You never saw that there? A. I never have seen it there.

Q. Where did you get Exhibit 1 from when you went to the Garden? A. Where did I get Exhibit 1?

Q. Can't you answer without repeating my question? A. Well, I want to answer you as you ask the question.

Q. Well, very well then, answer it. A. I got it at the office.

Q. Where? A. 20 East 125th Street.

Q. Who gave it to you? A. Who gave it to me? I took them myself.

Q. Were they lying there on the table? A. They were lying on the floor.

Q. And how many had you taken, roughly? A. Roughly? Oh, 250. I was giving them out, I was giving some out along the street.

Q. Now, Mr. Becker testified that there was an executive committee meeting. Did you hear him testify to that? A. No, I did not.

Q. Did you hear him testify that there was a committee of eight, of which you and he were members? A. No, I heard him testify that there was, but—was a committee to give out.

Q. Did you belong to that committee? A. Did I belong to the committee? I had volunteered to go on the committee.

Q. Did you belong to the committee? A. I had volunteered, your Honor.

Q. Well, don't you know whether you belonged or didn't belong? A. Why, in so far as individually go there, I went there upon my own individuality, no one asked me to go.

Q. I am talking about that committee, and I asked you if you are a member of that committee there? A. How many were on the committee? I don't know.

Q. Was Mr. Becker a member of that committee? A. Was Mr. Becker a member of the committee?

Q. That is what I asked you. A. Why, it is the custom.

Q. Don't make a speech. Answer yes or no. A. I must explain to you, you asked that question.

Q. If you cannot answer, say so. A. I can answer if you allow me. It was always this way, people would go on committees, would volunteer to go, we had no vote.

Q. I am not talking about voting or volunteering. I want to know whether Becker was on that committee with you? A. He may have been, he may

have come of his own wish, may have volunteered to go on it.

Q. Didn't you know? A. I was not aware of it, no, there are so many people who——

Q. You never knew of that? A. That Becker was to give out at the meeting.

Q. I am not talking about the meeting. I want to know whether Becker was on the same committee with you of the No-Conscription League? A. I am not aware of it.

Q. You didn't know that? A. I didn't know that.

Q. Did you hear him testify that at this trial? A. I could hear him testify? Did I hear him?

Q. On that point? A. Why, to tell you the truth I have not been paying much attention to the testimony.

Q. Did you hear him testify to that? Yes or no. A. I did not.

Q. How long have you know Becker? A. How long have I known Becker?

Q. How long have you known Becker? A. Well, I should say about, to be precise and to the point, about three months.

Q. How long prior to the Madison Square meeting did you see Becker? A. About a week.

Q. When did you first hear that the Madison Square meeting was to be held? A. Why, the meeting was held on a Thursday, and I heard about it on a Tuesday.

Q. On a Tuesday, were you told—that is, prior to this time, if I understood what you said, prior to your going to the meeting you had—had you ever distributed Exhibit No. 2 anywhere? A. Exhibit 2?

Q. Yes. A. No.

Q. But you have had the Exhibit No. 2 in your possession? A. Why, I have had one in my possession to read it, yes.

Q. Only one? A. Yes.

Q. So if I understand your testimony correctly, there are—prior to the Madison Square meeting you never had—you only had one copy of Exhibit No. 2? A. One copy of Exhibit No. 2—not in my possession prior to Madison Square Garden. I had seen No. 2.

Q. I am talking of the fact of having it in your possession? A No, I never have had that in my possession.

Q. Prior to the meeting at Madison Square Garden, at any time at all, you never had Exhibit No. 2 in your possession? A. No.

Q. What did you mean before when you said you had one of them? A. One of them?

Q. Yes. A. I mean, in seeing someone read Exhibit No. 2, and I took it out of his hand and read it and replaced it back into the owner's hand.

Q. Where was that? A. Where? Out on the street.

Q. Whereabouts? A. Whereabouts?

Q. If that incident is so clear, tell us where it was. A. Why, it was at a mass meeting, and that meeting was held at 10th Street and Second Avenue.

Q. What night? A. I believe it was on the night, Thursday was the 31st, and that would be May the 31st——

Q. Well, when was it? A. On the 28th, on a Monday night, to be correct.

Q. Well, some stranger was reading a paper like Exhibit No. 2? A. In the audience, yes.

Q. And he gave it to you? A. I asked him for it and read it.

Q. You read it, and then returned it? A. Returned it to him.

Q. That is the only time you ever had No. 2 in your possession? A. Yes.

Q. How many days prior to the Madison Square meeting had you seen Exhibit No. 2? When did

you first see it? A. Why, that would make it on a Monday night.

Q. I thought you said you had seen them up in 125th Street? A. Exhibit No. 2?

Q. Yes. A. I have not testified to that extent, I have not.

Q. Is it your testimony, now, that you never saw Exhibit No. 2 excepting on that one occasion? A. Excepting on that one occasion on Monday at the time of a mass meeting on 10th Street and Second Avenue.

Q. And is it your testimony, now, that you never saw the Exhibit No. 2 at 125th Street? A. Are you speaking of Exhibit No. 2 as the leaflet that is advertising the No-Conscription meeting?

Q. No. A. At Hunt's Point Palace.

Q. No, you know what Exhibit No. 2 is. A. Exhibit No. 2, I gave a statement here——

Mr. Content: This is the original one, this one down there.

A. (Continuing): I gave a statement of that, I did not see Exhibit No. 2 until Monday night, on the 28th, at 10th Street and Second Avenue.

Q. In other words, did you never see Exhibit No. 2 at the 125th Street place? A. I did not.

Q. Is that correct? A. That is correct.

Q. Now, at the 125th Street place, if I get correctly what you have testified to, this literature was scattered all over the place, wasn't it? A. The literature in the form of books, in the form of pamphlets, this is not literature, that is, literature is not leaflets.

Q. Call it leaflets if you like. That was scattered over the place, wasn't it? A. The leaflets, Exhibit No. 1?

Q. Yes. A. Yes.

Q. And among the leaflets that you saw there you never saw No. 2? A. It was never brought to me, I know.

Q. Well, now, this Monday night you spoke about you read No. 2, did you? A. I did.

Q. Did you read it carefully? A. I did.

Q. Were you thoroughly familiar with its contents? A. Was I thoroughly familiar with its contents?

Q. Yes. A. Why, in so far as the ideas were concerned, I had become familiar with them, yes, but not as to whom had printed it.

Q. I didn't mean that, you know what I mean. Did you know what No. 2 was about? A. I know it was about No-Conscription, yes.

Q. You remembered that all the way through, I presume? A. I did.

Q. And you read it all? A. I did.

Q. Didn't miss any of it? A. I did not.

Q. You made yourself thoroughly familiar with it? A. Yes, sir.

Q. And you read that part which says, recites the Conscription Law and so forth, did you? A. I read it all?

Q. Including that? A. I read it all.

Q. Including that, I say? A. I read the whole leaflet.

Q. This is the last question, I think, I want to ask: Prior to the Madison Square Garden meeting, how frequently had you and Becker seen each other? A. Well, I believe I had met Becker prior to the Madison Square Garden and the No-Conscription meeting, I used to meet him at our lectures on Sunday nights.

Q. How often was that? A. About once a week, just to look at him, and say hello and pass on.

Q. Is that the only converse you ever had with him? A. Yes.

Q. That is, just said how do you do and passed along? A. Yes.

Q. Never did anything else or say anything to him? A. Nothing personal.

Q. Only say hello to each other? A. Yes.

Q. And you never knew he was on the same committee with you? A. I did not.

Q. Never knew that? A. I did not.

By Mr. Weinberger.

Q. That Sunday night you referred to, that is the Sunday night meetings held on the avenue and other places? A. They were frequently addresed by Emma Goldman.

Q. At 126th Street and Lenox Avenue? A. 125th Street and Lenox.

Q. That is where you met—Becker came there to the meetings, did he? A. He came there alone and I met him.

Q. You saw him at some of the meetings of the No-Conscription League? A. Yes, sir.

The Court: We will now take a recess until quarter past two.

(Whereupon a recess was taken until 2.30 P. M.)

AFTERNOON SESSION.

2.30 o'clock P. M.

TRIAL RESUMED.

Mr. Weinberger: The defendants rest.

LAWRENCE BEVINS, recalled in rebuttal, on behalf of the Government, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Bevins, you testified on the direct case for the Government? A. Yes, sir.

Q. Did you have any conversation with the defendant Sternberg at all? A. Yes, sir.

Q. In the Madison Square Garden? A. Yes, sir.

Q. Now, in what language were these conversations conducted? A. In English, the only language I speak.

Q. The only language you speak? A. Yes, sir.

Q. And did he answer you? A. Yes, in broken English.

Q. In broken English? A. Yes.

By the Court.

Q. What did you ask him? A. I asked him, in taking the papers from him, I asked him where he got the pamphlets and he said he didn't know where he got them. I asked him what he was going to do with them and he said he didn't know.

By Mr. Content.

Q. And that was in what language? A. That is all spoken in English.

Q. You saw the witness Jacob Schoenfeld, the witness that was called here and testified this morning? A. Yes, sir.

Q. Is that the man that you had reference to in your direct testimony as being around with Sternberg? A. No, sir.

Q. Are you sure of that? A. Absolutely, because the man that was with Sternberg had black curly hair, dark features.

Q. Did he look like this witness Schoenfeld? A. No, sir.

Q. You saw them there? A. Yes, sir.

Q. Did you at any time in Madison Square Garden, to your knowledge, see Schoenfeld? A. No, sir.

Cross-examination by Mr. Weinberger.

Q. How long were you in the Garden? A. I went there about the beginning of the meeting.

Q. At what time; at the beginning of the meeting? A. Yes, sir.

Q. And did you take a seat immediately? A. Yes, sir.

Q. How many people did you see before you took a seat? A. Well, there was a few on the ground; I didn't notice about.

Q. How many did you speak to? A. I could not tell you; I have forgotten.

Q. About how many? A. I could not tell you.

Q. Was it fifty or one hundred? A. I could not tell you how many I spoke to.

Q. How many officers or guardsmen were there? A. I did not count them.

Q. How many were with you? A. With me personally?

Q. Yes. A. The whole bunch of them were all together.

Q. How many were in the bunch? A. I could not tell you how many there was.

By the Court.

Q. Was there half a dozen or a dozen? A. Well, about fifteen or twenty.

The Court: He has answered your question.

Mr. Weinberger: I am just doing this in reference to Schoenfeld to show these men that this man has not got as good a memory as he says he has.

The Court: He stated fifteen or twenty.

Mr. Content: I think, if the Court pleases, that Mr. Weinberger should confine his cross-examination to the direct examination—rebuttal.

By Mr. Weinberger.

Q. How many people—after you left that seat—how many people did you pass on the way up to the balcony? A. Why, the building was not so

crowded—the balconies were not so overcrowded that I could not get through them.

Q. You passed quite a few people on your way up? A. Up in the balconies?

Q. I mean on the way up. A. There was quite a few on the ground floor and quite a good many passing up at that time.

Q. All of whom you passed? A. Some were going in the same direction, some were passing me.

Q. You would not remember any of the people that you passed, would you? A. No, very few of them, anyway.

Q. Did you see into their faces? A. Very few of them, and I would be not likely to notice just who I passed.

Q. You would not be likely to remember any of the people whom you passed? A. Not unless something came up that drew my notice to them.

Q. And unless something happened in reference to a particular individual, so far as you were concerned, that you were interested in, you would not remember him at all, would you? A. No, sir.

Q. And when you got up to the balcony where you arrested Sternberg, how many people were there in that place? A. In that section there was the two of them, Sternberg and his companion.

Q. What do you mean, in that section? A. Between two posts in that section of the balcony.

Q. Were Sternberg and Schoenfeld sitting in the same seat, side by side? A. I could not say it was Schoenfeld; I don't know the name of the person.

By Mr. Content.

Q. You saw Schoenfeld on the witness stand. Was that the man that was there? A. It was not that person.

By Mr. Weinberger.

Q. Was he sitting alongside of Sternberg? A. The one that was sitting alongside was not Schoenfeld, though.

Q. You heard Schoenfeld testify that he was not sitting alongside of Sternberg, didn't you? A. There were only two men in that section when I saw them from below, and when I was up there there was only two men.

Q. Did you see him, Schoenfeld, here? A. Yes, sir.

Q. Did you hear him testify that he stood right in front of Sternberg? A. He could not have stood in front, because Sternberg was in the front seat.

Q. You are positive of that? A. I am positive of that; that is sure.

Q. But you say that you remember that Schoenfeld was not there? A. He was not there when I looked up in the balcony from below, and he was not there when I went up there.

Q. And when you arrested Sternberg were you not only interested in Sternberg? A. The other man that was sitting beside him made a remark and therefore I noticed him.

Q. What did he say? A. He tried to answer for Sternberg, about these papers, and I told him to keep still, I hadn't anything to do with him; that is the reason I noticed him.

Q. He had no papers? A. Who?

Q. The other man? A. No; I didn't look to see if he did or not.

Q. How many people were behind Sternberg in that section at that time? A. Nobody but myself.

Q. You mean to say that in that entire section everybody had gone? A. Between those two posts, yes.

Q. Will you describe the part between the two tiers? A. Up in the balcony on the north side of Madison Avenue, on the north side, the 27th Street corner, it is practically what it was, between two posts, two posts in front.

Q. How many seats are there in that section? A. There is about five seats all told, if I am not mistaken about that.

Q. And there was not anybody in the entire section except two men? A. Only two men; it is a bad place, so far as the speaker's standpoint is concerned, and only two men were in the place.

Q. How far were you away from Schoenfeld this morning in the court room here? A. I was back here by the door; he passed me back here by the door, and I saw him also.

Q. That is the only time you saw Schoenfeld, when you arrested Sternberg? A. I didn't see Schoenfeld.

Q. The man that you say was with Sternberg, you only saw him for a moment? A. Yes.

Q. Only saw him for a moment? A. I saw him that time I placed him under arrest; I sat down back of the two of them, and I had a chance to notice the two of them.

Q. Then you placed Sternberg under arrest and took them downstairs? A. Yes, sir.

Q. That is the last you saw of that man? A. Yes, sir.

Q. You heard Schoenfeld testify he was with—you heard Sternberg testify that he was with Schoenfeld, and when Sternberg was a witness you heard him so testify? A. The man who stood there was me; the man who was with Sternberg was sitting down beside him; Sternberg did not sit in back of him, and it was not the same man on the witness stand.

Q. Did you hear Sternberg talking to anyone else except to you upon the balcony? A. No.

Q. You didn't hear him talk anything to anybody in the balcony there? A. No.

Q. Didn't hear him talk English before the Commissioner at all? A. No.

Q. You were there, weren't you? A. Before the Commissioner?

Q. Before the Commissioner? A. Yes.

Q. For the first time they were brought up before the Commissioner, the four of them, I mean? A.

I didn't pay attention to them; I would not say, as I was not paying attention to them, and I don't know whether he spoke in English or not.

Q. You were only three feet away from the witness when he was testifying? A. At what time?

Q. At the time before the Commissioner? A. I don't know whether he spoke English or not; I didn't pay any attention.

Q. I say you were only three feet away while the witnesses were examined? A. I don't know whether three feet or six feet.

Q. Will you describe the man you say was with Sternberg? A. The man who was with Sternberg had dark, curly hair, you know, that is dark hair.

Q. A little louder, please. A. The man with Sternberg had very curly hair and dark features; black hair, perfectly black, and dark hat.

Q. How was he dressed? A. If I am not mistaken, it was blue.

Q. Blue suit? A. Blue suit.

Q. Have a regular collar on, a stiff collar on? A. I didn't notice.

Q. Notice anything else about him distinctive? A. No, sir.

Q. You still insist it was not Schoenfeld? A. I do.

Redirect examination by Mr. Content.

Q. When Schoenfeld was on the witness stand you were brought right up here and stood in front of him? A. I came up and spoke to you.

Q. You had a good look at him? A. I saw him and looked at him direct, and he was not the same man.

Recross-examination by Mr. Weinberger.

Q. You never saw the man that was with Sternberg before that night, that particular day? A. No, sir.

BENJAMIN SILVERMAN, recalled as a witness in behalf of the Government in rebuttal, testified as follows:

Direct examination by Mr. Content.

Q. You have been previously sworn, haven't you, Silverman? A. Yes, sir.

Q. Sergeant Silverman, you testified to a conversation between Sternberg and someone else? A. Yes, sir.

Q. In what language was that conversation carried on? A. Broken English.

Q. Did you understand the language that he used? A. I did, sir.

Q. Other than English? A. Yes, sir.

Q. What? A. I understand Yiddish and French.

Q. If that conversation had been in Yiddish you would have understood it? A. I would, sir.

Q. Just the same as if it had been in English? A. Yes, sir.

Q. You say now under oath that that conversation was not—was in English? A. Yes, sir.

Q. Did you hear Sternberg—did you go to the Commissioner's Court? A. Yes, sir.

Q. Were you there when these witnesses testified? A. Yes, sir.

Q. Did you go to the Magistrate's Court? A. Yes, sir.

Q. Were you there when the pedigrees were taken? A. Yes, sir.

Q. Did you hear Officer O'Toole take the pedigree of Sternberg? A. I can't recall the officer's name.

Q. Is O'Toole in court? (A man stands up.) A. Yes, sir, that is the officer.

Q. Did you hear him talk to Sternberg and question him as to his age and so forth? A. Yes, sir.

Q. What was that talk in, what language? A. In the English language.

Q. Was Yiddish used at any time? A. No, sir.

By the Court.

Q. So that the matter may be clear: Who took that bundle from Kramer? A. Officer Finan.

Q. In your presence? A. Yes, sir.

Q. And you know that this bundle has been marked Government's Exhibit 3? A. Yes, sir; he had the larger pamphlets nearest his elbow, and the smaller ones nearest his wrist, and he was giving them out.

Q. Was Exhibit No. 2 in his possession? A. Yes, sir.

Q. And Finan took it away? A. Yes, sir.

Q. There is no doubt about that? A. No doubt.

By Mr. Content.

Q. That is the same exhibit you saw over before the Commissioner? A. Yes, sir.

Q. With the same exhibit number and everything else? A. Yes, sir.

By the Court.

Q. And a distinct bundle was made of this stuff? A. Yes, sir, and his name—we wrote his name on it at once; that is, it was written on by Finan.

Q. His name was written by Finan in your presence on this bundle? A. Yes, sir.

By Mr. Content.

Q. And in the presence of the defendant also? A. Yes, sir.

Cross-examination by Mr. Weinberger.

Q. There is only one question: Isn't it a fact that Mr. Becker translated the questions and also the answers in the Police Court? A. Mr. Becker was not there when the pedigree was taken.

LOUIS P. KORNDOERFER, called as a witness in behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Korndoerfer, you are a keeper in the City Prison in the City of New York? A. I am.

Q. Sternberg, stand up, please. (The defendant Sternberg stands up.) Do you know this man? A. I do.

Q. Were you there when he was brought in as a prisoner at the City Prison? A. I was.

Q. Did you take his pedigree? A. I did.

Q. What questions did you ask him? A. The questions that are on the pedigree stamp.

Q. Are the answers to the stamped questions in your handwriting? A. Yes, sir.

Q. Do you remember the answers without refreshing your recollection by looking at them? A. No, sir, I would have to refer to those.

Q. Look at them and see if they refresh your recollection?

By the Court.

Q. I suppose you have a great many pedigrees? A. I do.

Q. You cannot remember any particular one? A. No, I cannot.

By Mr. Content.

Q. That is in your handwriting (handing same to witness)? A. It is in my handwriting.

Q. Look at that and see if it refreshes your recollection? A. Yes, sir.

Q. No. 2 is Sternberg on that commitment? A. Yes, sir.

Q. The pedigree is taken on the back of the commitment of the United States Marshal, is that it? A. Yes, sir.

Q. Look at No. 2, Sternberg being the second name on the commitment, and will you tell me what questions you put to him and what answers he made? A. Well, the pedigree stamp reads as follows: "Address" and the answer in English, "94 Rutgers Street. Age, 24" in English. "Color," he was white. He didn't answer that. That is a description we put down as the case comes before us. "Male or female," the stamp says as to the fact male or female and we put down "M." "Occupation: Hatter. Manufacturer of hats," something like that.

Q. What did you put down? A. "Hat." we put down, just an abbreviation. "Nativity: Russia." Answered in English. "Citizen of the United States. No Religion. Hebrew. Married, single, widow or divorced. Single. Do you read and write. No. Are you a moderate drinker. No. Do you smoke. No." That is all.

Q. Did you ask these various questions in the English language? A. I did.

Q. And were the answers made to you by Sternberg in the English language? A. Yes, sir.

Q. Did you use any other language? A. No, sir.

Q. Did you employ an interpreter? A. No, sir.

Cross-examination by Mr. Weinberger.

Q. Where was that done? A. Where?

Q. Yes. A. Where was it done?

Q. Yes. A. In the City Prison, Manhattan, at the time of his admission.

Q. When? A. The time is specified on the commitment.

Q. When was that, what day? A. On that date, June the 1st.

Q. When he was sent over by the Commissioner? A. Yes.

Q. And who was there at the time that you took that pedigree there, were the four of them there? A. The four of them came in at once.

Q. Took all their pedigrees at once? A. One at a time.

Q. They were all present when you took each one's pedigree? A. Yes.

Q. And you didn't ask anyone to translate and no one translated for him? A. No, sir.

Q. Did Becker or Kramer or Walker when you asked these questions tell Sternberg what to answer? A. No, sir.

Q. Or what they meant in the Yiddish language? A. No.

Q. Do you understand the Yiddish language? A. I understand German.

Q. Then I suppose you have got some idea when a man talks Yiddish? A. Yes, sir.

Q. And Sternberg did not answer in Yiddish? A. No.

Q. He did not answer in Yiddish? A. He did not.

Q. And the other three defendants were there at the time? A. Yes, sir.

JOHN J. HANLEY, called as a witness in behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Hanley, you are the Warden of the City Prison? A. I am.

Q. And were you the registrar designated by the Board of Elections to take the registration under the Draft Act of persons within conscriptive ages who have been incarcerated in the City Prsion at that time? A. I was by the Commissioner of Corrections.

Q. Did you get his personal registration— A. Yes——

Q. —of every person within the conscriptive ages? A. I did, with two assistants that went around with me.

Q. You were taking every prisoner personally? A. I did, I spoke to them.

Q. You know the defendant Sternberg? A. Yes, sir.

Q. Did you question him? A. Just the same as the others, just the same.

Q. I mean in English, the same as the others? A. Yes.

Q. Now, did you have an interpreter there, if necessary? A. Yes, one of the clerks, Deputy Warden, was a man of the Jewish race.

Q. He speaks German and Jewish? A. Yes, sir.

Q. What is his name? A. Julius Bramer.

Q. Did you ask any questions of the defendant Sternberg not in the English language, there were twelve questions? A. I did.

Q. Did he answer any of the twelve in English? A. He did, the first two.

Q. The first two? A. Yes.

Q. And as to the others? A. The third one he was muddled on and then I referred the matter to Mr. Bramer.

Q. But he did speak some English in your presence? A. In my presence he gave his name and address and when we got to his nativity, we had to get this interpreter, I cannot quote them, but you can refer to the questions.

By the Court.

Q. The first question is "name in full"? A. Name in full.

Q. And the second one is the house address and the third is the date of birth? A. I tried to take him along, by suggesting whether it was summer or spring or winter, and finally I turned him over to Mr. Bramer to find out before we could get any answer.

By Mr. Content.

Q. It is not your contention that he spoke entirely in English, but during the time he spoke some English to you? A. No, sir, it was enough so I could understand.

Q. Enough so that you could understand him? A. When I came to ask the other questions I couldn't seem to make a clear understanding of them and so I observing that asked the services of Mr. Bramer.

Q. Go ahead. A. And I asked him before he signed it, did he understand the questions.

Q. You asked him that in English? A. Yes.

Q. What did you ask him again, Warden? A. "Do you understand all the questions and the answer that are there?" and he said, "Yes." I said, "Sign it," and he signed it there in Jewish.

Q. You remember asking that question? A. Positively. I asked every one that.

Q. And when he said he understood all the questions he signed it in Jewish? A. Signed at the bottom of the card, that is, all the questions I had asked him, all of them.

Cross-examination by Mr. Weinberger.

Q. When you told him to sign, didn't you point to where he was to sign? A. Yes.

Q. You did point out where to him? A. Yes. There was quite some writing and I indicated to him where the line was for him to sign on, and he signed on that line.

Q. And then the defendant signed before you? A. He certainly did.

Q. Right on the line where you pointed? A. Right on that line, after all of the questions had been asked and he answered them.

Q. You gave him a pen and said, "Sign there," didn't you? A. Yes, sir.

Q. You indicated where he was to sign? A. Yes.

Q. Would a man do that even though he could not understand English, when you gave him a pen and signified that he was to put his signature down? A. He was not near enough to the others when they were signing to see what they were doing and when they got through at the table they went away.

Q. And you did that without anyone else being there? A. They came in one at a time.

Q. Would a man do that, you think? A. I don't know what a man would do.

Q. You say that the first question was, "What is your name"? A. Yes.

Q. You asked him that question as your first question, "What is your name"? A. Yes.

Q. And he told you his name? A. He did.

Q. Then he did just the same as he did here this morning; did you see him testify here this morning? A. I don't think I was down here then.

Q. You were in court this morning? A. I was.

Q. Did you see Sternberg take the stand? A. I don't recall that I did, I could not be positive, I have seen quite a number on the stand.

Q. You did not hear him answer questions or the question: "What is your name and give your address"? A. I do know. Through the interpreter, I recall that he was here.

Q. That he gave his name? A. Yes.

Q. What is your third question that you say was asked when you called the interpreter in? A. The place and date of birth, calling for the year and month.

Q. Well, is that it? A. Yes (looking at paper).

Q. Your first question is: "Name in full, home address"? A. Yes, sir.

Q. You probably said when you came to the second one, "Where do you live?" A. Yes.

Q. When you came to the third question, "Date of birth," you had difficulty with that one and you

called in the Deputy Warden Bramer? A. Not right away I told you.

Q. You could not make him understand the third question? A. That is I said was it in the summer or winter or spring, and evidently he didn't understand it.

Q. Then you called the interpreter? A. Yes, sir. sir.

Q. And then the other questions were indicated to this witness by the interpreter, Deputy Warden Bramer? A. Afterwards?

Q. From the third on? A. Practically. Well, I guess I did put one or two of them or some of them.

Q. Then, at the end, you asked him to sign and Bramer made the remark and said also: "You sign there, do you understand"? A. He didn't have to do that, it was not necessary, but he was putting the questions to him and naturally I suppose he spoke to him, too.

Q. Didn't Bramer pick up the pen and hand it to him and point with the pen where he was to sign after he—after you had indicated, did not Bramer do the translating? A. Bramer did not translate every one of them; as I said before, I put some of them to him, I took charge of the order and the asking the questions myself, and those that he did not seem to understand, why, Bramer put the questions to him. The questions showed the order in which they are asked. There were a number of questions after that that he understood and answered me all right, but when I got down to the question of exemption, what ground he had, if any, and so forth, I had to call in Mr. Bramer again.

Q. In other words, this man did not really understand anything you said in English except when you asked his name he said Louis Sternberg, and then "where do you live" and so and so Rutgers Street and then when you come to the next subject

of examination he really could not understand you and you could not make him understand actually? A. No.

JOHN J. ROMANO, called as a witness on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Romano, you are secretary to United States Commissioner Hitchcock? A. Yes, sir.

Q. On the 2nd day of June, 1917, were you present at the hearing, in the matter of Louis Kramer and others, including Louis Sternberg? A. I was.

Q. Were you standing close to the witness at the time? A. Yes, sir, close to the witness, alongside of the Commissioner.

Q. Alongside of the Commissioner? A. I was on the left of the Commissioner, as though he stood here (indicating) and I was here (indicating).

Q. And the witness sat in a chair right in front of him? A. Yes, sir.

Q. His head turned this way? A. That is right.

Q. And you were right in back of the Commissioner who was holding court then? A. That is correct.

Q. Did you hear Louis Sternberg being called as a witness? A. I did.

Q. Do you recall whether he was sworn? A. I do recall.

Q. And was the defendant sworn, that is, sworn by Commissioner Hitchcock in the English language? A. The English language.

Q. Do you recall his being examined by Mr. Weinberger, his counsel? A. Yes, I do.

Q. Now, will you tell us just what language was used by Mr. Weinberger, and the replies of the wit-

ness? A. At the beginning of the examination Mr. Weinberger asked him in English a few questions and then an interpreter was called, if I recall correctly, a man from Mr. Weinberger's office.

Q. What was that? Somebody that was with him? A. Somebody who was sitting with him whom I understood to be from Mr. Weinberger's office.

Q. Somebody who was sitting with him in court? A. Yes, and thereafter the examination was carried on with the interpreter, partly through the interpreter and partly he understood himself.

Q. Well, now, the first two questions on direct examination asked Mr. Weinberger were conducted in what language? A. In the English language.

Q. Are you clear as to that? A. I am positive as to that.

Cross-examination by Mr. Weinberger.

Q. Where were you sitting? A. I was standing alongside of the Commissioner.

Q. On what side, his right or left? A. I was standing to his left.

Q. Didn't you see Harry Goidel, an attorney, used as an interpreter and being sworn as an interpreter?

Mr. Content: He was not sworn as an interpreter, you objected.

Mr. Weinberger: I said he was an attorney and he did not have to be sworn.

A. Yes, the question came up at the time that he was an attorney and I understood he was from your office.

Q. He was just there—isn't it a fact that he interpreted right through all these questions? A. No, sir.

Q. How many cases have you had since that before the Commissioner? A. You mean actual hearings or just arraignments?

Q. Actual hearings and arraignments? A. Oh, I should judge about fifteen, ten or fifteen.

Q. And you remember all about these different things in regard to every case during the last couple of weeks? A. I recall some of them.

Q. And you have been pretty busy during this time, haven't you? A. Not as busy as we could have been.

Q. You have been quite, though, more so than during part of the year, you have been pretty busy the last two weeks, I say? A. Pretty busy.

Q. With people in there on arraignments and also on the question of bail? A. On the different questions that come up before the Commissioner.

Q. And in that particular time there was no more reason why you should notice the particular fine points of this case any more than any other case or cases that happened to be before you? A. Why, I think there was a particular interest to me in this, because it was the first case of this character that came into our office.

Q. Was not the Phillips case before ours? A. It was—I don't think it was as conspicuous as this.

Q. Was it there and wasn't it brought before ours? A. Yes, it was.

Q. And there was just as much excitement about bailing and all the rest of it, there? A. I don't think there was.

Q. With two attorneys representing the defendants and the mother of the defendant being there? A. That is right.

Q. And this case just followed in its natural sequence? A. That is right.

Q. And we put witnesses on to try to get the Commissioner to turn Sternberg and Walker out, as they had nothing to do with it and knew nothing about Becker or Kramer? A. Yes, I recall that.

Q. All I want you to do is this: I want you to clearly search your mind—and let me say to you in asking this question, it is not insulting to you,

but I ask you this question and I do so, wanting you to search your memory to make sure that you remember clearly what you are saying, and I want you to search your memory and tell me honestly, that is all I am asking the question for, to find out if you can clearly remember these things, and remember them so clearly and to be so sure about every bit of it, that is why I am asking you the question. What I want you to do is to search your memory as closely as you possibly can, and tell me whether it is in your mind so clearly that the answers, the answers to these first two questions were in English? A. Why, it certainly is in my mind very clearly, very clearly, and clearly enough so that I am positive of the fact.

VALENTINE O'TOOLE, a witness called on behalf of the Government, in rebuttal, begin first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. O'Toole, you are a police officer of the City of New York? A. Yes, sir.

Q. In the detective service? A. Yes, sir.

Q. What is your shield number? A. 505, Fourth Branch Detective Bureau.

Q. On the evening of the 31st day of May, 1917, did you take, among other things, the pedigree of the defendant Louis Sternberg at the Magistrate's Court? A. I did.

Q. What language did you take it in? A. English.

Q. What questions did you ask him? A. I asked him his name.

Q. What did he reply? A. Louis Sternberg.

Q. What else? A. I asked him his address and he told me 94 Rutgers Street. I asked him what he worked at and he told me he was a hatter. I

asked him how old he was and he was 22. I asked him where he was born and he said in Russia. At that time defendant Kramer entered into the case, and he came over and told me, he says, he says something in Jewish to Sternberg and then he told me he cannot talk English and he started to tell me his name was Sternberg.

Q. You had already asked him this question? A. Yes, and Detective Finan was taking it down as I was asking.

Q. Now, you know the defendant Becker? A. Yes, sir.

Q. And was he there at the time? A. No, sir.

Q. He had not been there, he had not been brought in up until that time? A. No, sir.

Q. You hadn't seen anything of him or heard anything of him up until that time? A. No, sir.

Q. And these questions that you asked Sternberg before Kramer butted in were all in the English language? A. There were—they were.

Q. And they were answered in English? A. Yes, sir.

Cross-examination by Mr. Weinberger.

Q. Where did you take his pedigree, Officer? A. He was in the pen.

Q. Where? A. In the Magistrate's Court, 57th Street.

Q. You say the defendant Becker was not there? A. Not at that time.

Q. When did he get there? A. After.

Q. Were there any pedigrees taken at that time? A. Afterwards?

Q. After Becker got there? A. Detective Finan then took the pedigrees.

Q. He took pedigrees while Becker was there? A. No.

Q. Were not any pedigrees taken when Becker was there? A. Not that I have heard.

Q. Not that you heard? A. No.

Q. You didn't hear Becker at any time translate for Sternberg? A. No, I took Sternberg's pedigree.

Q. You are the only man that took his pedigree? A. Yes, sir.

Q. And at that time you claim that Kramer did not interpret after the first few questions? A. No; Kramer butted in and I told him to mind his business; I told him to stay away from giving the rest of them a schooling. I said, "You are in bad enough, do not be trying to get this man in worse." He answered them in English to me.

Redirect examination by Mr. Content.

Q. You had nothing to do with the arrest? A. No, sir.

Q. You just took the pedigree? A. That is all.

By the Court.

Q. As I understand it, you were on duty that night and took pedigrees? A. Yes, and I assisted him to the court.

SAMUEL M. HITCHCOCK, a witness called in behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are the United States Commissioner for the Southern District of New York? A. Yes.

Q. Do you recall the hearing held before yourself as such Commissioner on the 2nd day of June in the matter of Louis Kramer and three others? A. Very well.

Q. Defendants, all stand up. (The defendants all stand up.) Do you recall these all being before you? A. I do.

Q. Do you recall the examination of the defendants? A. I do.

Q. Do you recall Sternberg—Sternberg, stand up. (The defendant Sternberg stands up.) Do you recall him? A. I do.

Q. And his examination? A. I do.

Q. Did you swear that defendant? A. I did.

Q. In what language did you swear him? A. In English.

Q. Did he raise his right hand? A. He did.

Q. Do you recall Mr. Weinberger's direct examination of Sternberg? A. I do.

Q. Now, will you tell us what language was employed therein? A. At first it was in English.

Q. And after that? A. After that, after replying to several questions in English, Sternberg seemed to hesitate, and I asked him if he could understand the English language to speak it and he said not very well; and then it was suggested by, I think not by Mr. Weinberger but by his associate, that there should be an interpreter and an interpreter was agreed to by yourself, sworn and from there on the interpreter was used.

Q. Do you recall that the first two questions on direct examination were asked by Mr. Weinberger in English? A. In English, yes, certainly.

Q. And that Sternberg gave his answer in the English language? A. Yes, sir.

Q. You do not understand Yiddish yourself? A. I do not.

Cross-examination by Mr. Weinberger.

Q. And when Sternberg took the stand you—let me ask first, Mr. Commissioner, you have been a pretty busy man these days? A. Yes, quite busy.

Q. In all these cases? A. Not unusually so.

Q. But with all the bonds and bails and all that? A. Not unusually so.

Q. But quite busy? A. As a matter of usual thing, yes, sir.

Q. Not unusually so? A. Not unusually so.

Q. But you have been quite busy just the same? A. Yes.

Q. There was not anything about Sternberg testifying at that time to particularly impress it on your mind? A. Why, I have a very good memory The testimony of each of the witnesses before me was impressed upon my mind.

Q. I mean the method of their testifying or anything that happened in the small particulars? A. Why, I think I have a general—very full, general recollection of it all.

Q. This case was not more particular to you than any other case? A. It was an unusual case.

Q. At the time after the Government had rested and I made various motions on behalf of the defendants Sternberg and Walker, stating that as they had nothing to do that evening with the giving out of the pamphlets in Madison Square Garden, and at the end of the argument I said that I would only go into the case for the purpose of trying to get Sternberg and Walker out on——

Mr. Content: How is this material?

Mr. Weinberger: This is quite material, if you will let me go on and finish my question.

Mr. Content: All right.

Q. (Continuing): I was going only to go into the case before you, merely trying to get these two out and stand on the Kramer and Becker alone; I said I would call Sternberg, and then there was a mix-up around the desk in that room, the room being crowded right near your desk, and you asked Sternberg to testify in—did you say anything to him in Yiddish about putting his hand up? A. I don't recall when I asked him to be sworn, someone may have said in Yiddish or any other language to raise his hand.

Q. You didn't hear? A. He responded.

Q. He responded, and you don't know whether in response to your request or that of someone who may have said something to him in Yiddish? A. It was very prompt after my . quest.

Q. There was a lot of soldiers around the back of you, and near the window, and near the door, and the room was crowded, wasn't it? A. No, the room was crowded, but not with soldiers.

Q. I say, there were soldiers and sailors, were there not, over near the window? A. Yes.

Q. To your right, and then around to your left, where the witness stand was, was crowded with ordinary people? A. Yes.

Q. The whole room was crowded? A. The room was very full.

Q. And Sternberg sat on the left of your desk and right alongside of him was Mr. Goidel, an attorney, and then I came, on the long table, away from your desk? A. Yes.

Q. And we were all crowded right up close? A. Yes.

Q. And when some questions were asked, didn't you hear something said to Sternberg as soon as your question was asked, even at the beginning, in Yiddish? A. I did not.

Q. Or wasn't it then that I said we had better have an interpreter, Mr. Goidel, who is an attorney, can interpret? A. I think I recall the question that he wanted to get the full meaning of, and I think I myself asked him if he could speak English well, and he said not very well.

Q. We put Becker, Kramer and Walker on the stand before, before we put Sternberg, didn't we? A. I think so; I think that is the order in which they came.

Q. After Sternberg was called as a witness, and sworn, I presume the question was, "What is your name," but they haven't got that here, they merely say, "Louis Sternberg, called as a witness in his own behalf, being first duly sworn, testified as fol-

lows:" The first question naturally was, Mr. Commissioner, what was your name? A. I asked him that, it was taken down.

Q. And he answered that? A. It was not a part of the examination taken down and made a minute of.

Q. It was your first question? A. That furnishes the basis for the heading of his testimony.

Q. And he answered your question, "Louis Sternberg." A. "Louis Sternberg."

Q. And your next question was, "Where do you live?"

Mr. Content: That was your question.

A. Oh, yes, I thought you said "my question."

Q. I mean, in other words, the first two questions he may have answered in English, that is what I am thinking of now, in other words, you asked him first, what was your name, and started his examination by saying, "Where do you live? A. No. 49 Rutgers Street." And then I asked the question, "Did you go to Madison Square Garden on the 31st day of May?" And I then asked that we have Mr. Goidel as an interpreter. A. I think not.

Q. If your recollection is clear on that— A. I think not. Do you wish to know my recollection?

Q. No, that is your answer, you think not.

By the Court.

Q. What is your recollection? A. My recollection is that the interpreter was not called in until after that question, or rather answer, "No, I don't belong"——

The Court: The Commissioner's voice is not very strong, but the Commissioner testifies that his recollection is that the following questions were asked and answered in English:

"Q. Where do you live? A. No. 49 Rutgers Street.

"Q. Did you go to Madison Square Garden on the 31st of May? A. Yes.

"Q. Are you an anarchist? A. No.

"Q. Do you believe, or rather do you belong to any No-Conscription movement? A. No, I do not belong.

"Q. Did you give out any of these leaflets of the kind shown here by Government's Exhibit 1, or Government's Exhibit 2?"

As I understand the Commissioner, it was at that exact point that the interpreter was called in.

The Witness: Yes.

JAMES J. FINAN recalled on behalf of the Government in rebuttal.

Direct examination by Mr. Content.

Q. Mr. Finan, did you ever hear the defendant Sternberg when he talked English? A. Yes, I heard him on two occasions.

Q. When was the first occasion? A. The first occasion was in Madison Square Garden and the second occasion was in the Night Court, the police court.

Q. Were you present with the officers at the time the pedigree was taken? A. I was.

Q. You heard his testimony? A. I did.

Q. Is that correct, does that accord with your recollection, what the officer said? A. It does, sir.

Q. Was there any Yiddish used at that time? A. No, the officer and myself do not speak Yiddish.

Q. Was the defendant Becker there when Sternberg's pedigree was taken? A. No, Becker had not been brought in at that time.

Q. Had not been brought in yet? A. No.

Q. Did you hear Sternberg talk English on another occasion? A. I did, I heard him talk English when he was talking to his counsel there, Mr. Weinberger, speaking good English then.

Q. Where was that and when? A. That was in the Commissioner's hearing, here in this building.

Q. Right down on the third floor? A. Yes.

Mr. Weinberger: No questions.

By the Court.

Q. While you are on the stand, I want to ask you one question: At the time that you took this package, Government's Exhibit 3, from Kramer, was the No-Conscription circular, Exhibit 2 in evidence, one in that package? A. Why, yes, sir, it was, your Honor, that one and No. 1, and there was some others there.

Q. Yes, I understand that. Was the package in exactly the shape it is now, together with the two exhibits in evidence? A. No, it was opened flat, except that he had them sort of, not exactly folded, they were not rolled the way they are now, they were sort of crumbled together in his hand after he refused to give them to me.

Q. My question is, directing your attention rather to the very paper that you took from him, that at that time they were put together and marked with his name on it? A. In his presence then, before I moved the stuff away from there, there is my writing (indicating).

Q. There is no doubt in your recollection, as I understand you, that these various leaflets, exactly like No 2 in evidence, were in this group of papers that you took from him? A. There is no doubt of that, your Honor, because it was all rolled up and put together and marked in his presence.

Cross-examination by Mr. Weinberger.

Q. Officer, have you ever attended any radical meetings? A. I have never attended a radical meeting at 4th Street and Second Avenue; I have never attended a radical meeting at 127th Street, Sulzer's, you know, where the defendant Kramer charged me, and the record of the Police Department will show I have never attended any meetings there, it would show where I was at those times.

Q. You said 4th Street? A. I said 4th or 127th Street.

Q. 127th Street and Harlem River Casino? A. I did not, never.

Q. Did you ever attend any meetings on this subject? A. Never, to the best of my recollection. I hung out a good deal at 125th Street and Madison Avenue, but I never attended a meeting there, never did.

Q. Have you ever attended any meeting up at Carnegie Hall? A. Never.

Q. Or Cooper Union? A. Never.

Q. Nor any at all? A. Never attended any meeting, of any No-Conscription meeting, of any kind.

Q. Or a business meeting? A. Not even an anarchist meeting, up to the one at Madison Square Garden.

JAMES INNELLA, a witness called on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Innella, you are a Deputy United States Marshal for the Southern District of New York? A. Yes, sir.

Q. A few days ago did you bring the defendant Walker to my room? A. Yes, sir, last Thursday.

Q. Last Thursday? A. Yes.

Q. Will you state briefly what the conversation was between Walker and myself? A. Yes, sir. Mr. Walker sent you a letter that he would like to be brought down and have a talk with you, and you sent for him through the letter, and he came down there; he said he knew he was getting framed up—

(Continuing) A. Walker said he knew he was getting framed up. And he says he will come down to-morrow, "You send for me to-morrow and have the officer there who arrested me." He said he would like to come down the following day, Thursday, at 2.30 P. M.

Q. Was he brought down the following day? A. Yes, I went up, I was sent up by you to get him.

Q. Then on Thursday, was he nervous that day? A. Yes, he said he was nervous, and would like to be brought down to-morrow, and he would get together.

Q. He was not asked many questions, was he? A. No.

Q. After that day, on Friday, was he brought again into my office, and did you go up and bring him down? A. I brought him down again.

Q. Were all the officers here at that time? A. All the officers were here at that time.

Q. Did he have an opportunity to question the officers, that is, Officer Henry of the 69th, I mean? A. Yes, sir.

Q. Will you tell what he asked Henry? A. He asked Henry if he seen him give out pamphlets.

Q. What did Henry reply? A. He said, yes, sir, he did see him give them out.

Q. Do you remember whether he asked Henry whether he was there—what did Henry reply to that, in the presence of Walker, as to his giving out papers? A. In the presence of Walker and the other officers that were there, he said, sure, he had seen him giving them out.

Q. Did he have any opportunity he wanted to question any of these men? A. Yes, sir.

Q. Did Walker say anything to you with reference to where the pamphlets were obtained from that were found on him? A. Yes.

Q. What did he say? A. He said Kramer gave him 75 or 100 to give out, but that the plan did not work out, as he gave out but two or three of them at that time that he was arrested by Officer Henry, that is all he said.

Q. Were any threats or inducements of any sort given? A. No, sir.

Q. To make Walker to swear falsely or anything of that sort? A. No, sir.

Q. Any promise made to him concerning his testimony? A. No, sir.

Q. Anyone raise their voice to him or browbeat him, or intimidate him in any way? A. No, sir.

Q. It was made clear to him that he was brought there in accordance and because of the letter he had written to me? A. Because you received a letter from him.

Q. And also Commissioner Hitchcock? A. Yes.

Cross-examination by Mr. Weinberger.

Q. You say the first time he was brought there he said he was nervous? A. Yes.

Q. It is a fact, isn't it, that he has been nervous ever since you have had him in your custody, scared to death? A. No, sir, I did not scare him in any way during that time, treated him as a gentleman.

Q. I didn't say you scared him, I say isn't it a fact that he has been nervous and scared? He says he has neurasthenia. A. He was nervous; and I noticed him, that he does act nervous, and I noticed him in regard to that all along.

Q. He says he is suffering from a nervous ailment, called, as he says, neurasthenia, which is a most common complaint? A. It didn't strike me that he suffered very much from it.

Q. My question is not that you made him nervous or scared him, my question is was not he as a matter of actual fact, nervous and scared? A. Last Thursday he was just a little nervous, that is all.

By the Court.

Q. That was the day that no questions were asked? A. Yes, sir.

By Mr. Content.

Q. That is the first day he came down? A. Thursday at two thirty.

By Mr. Weinberger.

Q. He was so nervous on the first day that he was brought to the District Attorney's office, after he had written the letter to you, or rather to the District Attorney, about being framed up, that you had to take him back because he could not tell his story? A. No, sir.

Q. What then, what did you take him back for? A. He said in the District Attorney's office that he was very nervous that day, and that he would like to be brought down the next day, the following day, and I took him right back. He said he wanted to go right back. I brought him back immediately, at his request.

Q. Didn't you see he was actually nervous? A. There was a little symboling there, as I took him from the Tombs; he admitted to me that he was not feeling very well, and he very often rubbed his face with his hand, as he was coming down.

Q. And pulling his handkerchief out? A. He got his handkerchief out, yes.

Q. He was not able to tell you anything about his story at all? A. I don't know what kind of a story he had to tell, or anything, I am only telling what I did.

Q. The reason you took him back on that day was because he was nervous? A. He admitted himself that he was nervous and he wanted to go right back to the Tombs, and didn't want to talk.

Q. When did you first see Walker? A. I seen him the first day he was brought in here, took him in the Tombs on Thursday.

Q. Was he nervous on that day? A. No, sir.

Q. Noticed anything nervous about him? A. No, sir.

Q. Did you pay any particular attention to him? A. No, sir.

Mr. Content: The Government rests.

HARRY WEINBERGER, a witness called on behalf of the defendants, in rebuttal, being first duly affirmed, testified as follows:

Direct examination by Mr. Weinberger.

Q. Is Louis Sternberg one of your clients you are defending here to-day? A. He is.

Q. At any time since you have represented him, has he spoken to you in the English language? A. He has not.

Q. Have you attempted to talk to him in the English language? A. I have.

Q. Could he understand? A. He could not, and I had to try and talk to him in the Jewish language, and then had Mr. Becker or Mr. Kramer translate for him, being fairly poor myself in making myself understood in the Jewish language.

Mr. Content: No questions.

Mr. Weinberger: The defendants rest.

HAROLD A. CONTENT, recalled on behalf of the Government, in sur-rebuttal, testified as follows:

Direct examination by Mr. Hartridge.

Q. Mr. Content, were you present at the hearing on June 2nd, before Commissioner Hitchcock? A. I was.

Q. Now, did you hear the examination of the defendant Louis Sternberg? A. I did, and I remember it very clearly.

Q. In what language was it? A. The first five or six questions were in the English language, and I can indicate from the record, a copy of which is in my possession, just where, and the exact spot the interpreter was first called in. The question was, "Where do you live?"—was asked him in English by Mr. Weinberger, and I was standing in front of the witness, and he answered in English, "49 Rutgers Street." And the question, "Did you go to Madison Square Garden on the 31st of May?" And it was answered, "Yes," in the English language. The question was, "Are you an anarchist?" And the answer, "No," all being in English. The question was, "Do you believe in or rather do you belong to any No-Conscription movement?" And he answered this question and I remember the language in it. He said, "No, I don't belong," and I can hear him say it now. The question was, "Did you give out any of those leaflets of the kind shown here by Government's Exhibit 1 and Government's Exhibit 2?" And was answered in English, and I held up the leaflets for him when Mr. Weinberger asked that question, whether he had them before him, and the question was, "Where did you get them?" And he answered in the English language, and then there was another question and then this question was asked, "Did you go over to meet Mr. Becker or Mr. Kramer?" And he said, "I don't know who they are, I don't

know them." And then this question was asked, "Did you tell anybody not to register?" And he didn't get what register meant, and then is the time when it was stated by Mr. Weinberger that we ought to have the services of the interpreter, and he suggested this man, and I asked him to be sworn, and he said he didn't want to be sworn, and the Commissioner said as long as he is an attorney he need not be, and I said all right, what do I care. From there on the English question that was asked, the question by Mr. Weinberger, was asked through the interpreter. When it came to cross-examination by me, I asked him, "How old are you?" and I asked that question in Yiddish, and he answered it in English, "Twenty-four," and after that the examination was in Yiddish. That is the way as I remember it very distinctly, that Mr. Goidel, the attorney, came in to act as interpreter and talked from then on in Yiddish, the questions to the witness, and the answers of the witness were repeated by him in the English language, but I remember that attorney Goidel did not appear in the first part of the questions and answers. They were in English by the witness.

Cross-examination by Mr. Weinberger.

Q. Didn't you hear the Commissioner testify that the question, "Did you give out any of these leaflets?" That that question given here in these minutes. "Did you give out any of these leaflets of the kind shown here by Government's Exhibit 1 and Government's Exhibit 2," as the place where the interpreter came in? A. I remember very clearly that was asked in English and I remember that I held up Government's Exhibit 1 and Government's Exhibit 2, and I repeated the question so there would not be any mistake.

Mr. Weinberger: May I straighten this question out by referring back to the Commissioner's testimony?

The Court: The Commissioner did testify as you say.

Q. Up to that particular question, in other words, you disagree with him? A. I am giving my recollection.

Q. He didn't go down the page as far as you did——

The Court: That speaks for itself, and the fact is that the recollection of these gentlemen is different on this question as to the questions and answers that were asked and answered in English, and their recollection differs as to just at what point it was that the interpreter was called in.

Mr. Content: The Government rests.

MORRIS BECKER, recalled on behalf of the defendants, testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Becker, where did you first see defendant Sternberg? A. 57th Street.

Q. In the court—in the jail of the court? A. In the place where there is a front like—I don't know what you call it—where there is a little place with a man sitting at the desk and asking questions.

Q. Who was there at the time you got there? A. I find other prisoners.

Q. Which ones? A. Kramer and Walker and Sternberg and the girl.

Q. And had they taken any of the pedigrees before you got there? A. I don't know what they did before, but I know when I came in they were asking questions, and they asked every one of them

to answer, and I was surprised that none of them—

Q. Don't tell us you were surprised, that is a conclusion of yours. A. None of them wanted to answer, really answer for him, and I was the one that answered them; I told them then I didn't understand the reason why they didn't call in an interpreter, a Jewish interpreter to ask the questions and get his answers.

Q. You answered and he took the statements down? A. When they asked him.

Mr. Weinberger: Is that man here?

Mr. Content: O'Toole, stand up. (Man stands up.)

Q. Is that the man that took that down? A. I cannot tell.

Q. You don't remember him, but you answered the question, that is, you put it in Yiddish to him and then interpreted his answer? A. Yes, sir.

Q. And they took the pedigree of the others at the same time? A. Well, they asked them some questions—I don't know whether it is all the questions or not—I know there were a number of questions asked.

Q. While you were there? A. Yes, sir.

Q. And you did interpret, and then your pedigree was taken? A. Yes, sir.

LOUIS KRAMER, recalled on behalf of the defendants, testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Kramer, were you taken to the 57th Street police court at the same time that Sternberg and Walker were? A. I was.

Q. And did you hear the pedigree of Sternberg taken? A. I did.

Q. Did he answer in English to questions in English? A. He did not; he had to have the questions and answers interpreted.

Q. Who interpreted the questions and answers for him there? A. Why, partly from the man Becker and partly from myself.

Cross-examination by Mr. Content.

Q. Mr. Kramer, were you ever convicted of a crime?

Mr. Weinberger: Wait a moment. I object to it on the ground it is not proper rebuttal of any questions asked.

Mr. Content: It is always a test of a witness' credibility, and I submit that question to the Court as a proper question.

The Court: I will allow it.

Mr. Weinberger: I respectfully except.

A. Why, it is according to what Mr. Content calls a crime. I was fined once ten dollars for giving out birth control information.

TESTIMONY CLOSED.

Mr. Weinberger: I ask first, for the purpose of arranging my motions, and for the purpose of summing up, that I be given an adjournment, and the reason for that is this: I am absolutely, physically, tired.

You will remember the first day, when this case began, I had just a few days to prepare my law on the question of the unconstitutionality of this Conscription Law, and I have been working right along in the libraries, on Saturday and on Sunday, and last night I went out of here after 6 o'clock and I had to go back to my office and finish a brief that had to be given to the printer this morning, and was in my office until almost 9 o'clock; and I have

not had a chance to prepare requests to charge at the end of the summing up, nor have I prepared motions in reference to the various defendants; and I respectfully ask, in view of my physical inability and tiredness, at this time, not to sum up; and that the defendants be given an adjournment until tomorrow morning, and that I be allowed to prepare my law, and allowed to prepare for summing up. I do not believe it is fair to the defendants to ask me to sum up before then, bearing in mind my present tired condition, as I do not believe that I can properly present their case to this jury.

In view of that physical inability, I ask the Court that we adjourn, and the hour being half-past three, almost near the usual adjournment of Court——

Mr. Content: Not of this court.

The Court: The Court desires to state that there is no usual hour of adjournment of this court, and the hour of adjournment is at the suggestion and discretion of the Court. The statute requires that cases involving the so-called Registration Law, which will include any case in my judgment involving an indictment for conspiracy to violate the statute, shall have preference over all other cases. The Court feels that it is the Court's duty to progress with the case. In addition to that, the question of whether or not the case shall continue or not rests in the Court's discretion.

Motion denied, or rather you may proceed with your motion.

Mr. Weinberger: I might say to the Court at the time of the examination of the jury I tried to speed this case up and bunched my questions to not delay the Court; and I appreciate that this is a case that is given preference, but I don't believe that the rights of the defendants should be prejudiced by the exhausted condition of the defendants' counsel, or the excess of speed, because there is no necessity for speed.

The Court: Your motion is denied. Have you any motions?

Mr. Weinberger: May I respectfully have an exception on the ground of physical inability to proceed and the Court forcing me to finish the case tonight?

The Court: Yes, certainly.

Mr. Weinberger: And I now move on behalf of the four defendants for dismissal of the conspiracy charge and for a direction of verdict on the ground the Government has failed to make out a case.

The Court: The motion to dismiss as to Becker, Kramer and Walker is denied.

In regard to Sternberg, I desire to make it clear that I am not passing on the credibility of witnesses, but that such differences as to the facts in regard to Sternberg's case as have arisen are matters with which I am not now dealing, and if they should in any manner become germane to the other cases, this will be a matter to be argued by counsel and to be dealt with if I deem it proper in the charge of the Court.

From the testimony, however, it appears that Mr. Bevins did not actually see Sternberg distribute the literature, but I understand the Government does not contend that Sternberg distributed any literature. On that branch of the case it would seem to me that Bevins was a very truthful young man and did not state anything more than he actually saw. Now, what he did state was that he saw some leaflets drop down to where he was below, and that when he went up to the balcony there were two persons, and he found some leaflets on one, namely, Sternberg, but that he did not search the other man, and that he did not find out or have any knowledge as to whether there were any leaflets on him.

Non constat these leaflets may have been dropped by the other man.

The further proof shows, uncontradicted, that Sternberg did not know either Becker, Kramer or Walker and had no reason—there is no evidence

that he had received any of the circulars from these men; and as to him there is no evidence of any agreement or conspiracy; so as to him I am of the opinion that there is no evidence that he is guilty of the crime charged, and I grant the motion, which is a motion for dismissal, made by counsel, for the direction of a verdict, that is, for a directing of the jury to return a verdict of acquittal in favor of defendant Sternberg.

(Defendant Sternberg acquitted by order of the Court.)

Mr. Weinberger: I now ask on behalf of the defendant Walker that he be dismissed, there being no testimony that he urged people not to register, even assuming the People's case to be absolutely so, the only testimony is that he gave out leaflets; and I ask that that not constituting a crime, that he be liberated. I ask in behalf of Walker that the jury be directed to find a verdict of acquittal.

The Court: I deny the motion.

Mr. Weinberger: I respectfully except.

The Court: Now, let the Clerk take the verdict of acquittal in favor of Sternberg.

The Clerk: By direction of the Court, you find a verdict of acquittal, or not guilty, as to Louis Sternberg, and so say you all.

The Court: Sternberg may be discharged. I will allow you a recess of five minutes before you sum up.

Mr. Weinberger: Cannot I have at least half an hour, then, if the Court pleases, before I sum up, and then I will sum up.

The Court: Don't take that long, I will give you until ten minutes of four, and it is now twenty-two minutes of four.

(Recess until 4 o'clock.)

Mr. Content: If your Honor please, I did not offer in evidence as any part of the Government's case, and I do not know if there is any necessity for it, as I could have proven it, and what I would

have proved was that on the 18th day of May, 1917, the President made his proclamation as to the Conscription Law, and it may be admitted that the proclamation was made.

Mr. Weinberger: I concede that fact.

Mr. Content: It is conceded that on the 18th day of May, that the date of June 5th was duly fixed as the day of registration, from 7 A. M. to 7 P. M.

Mr. Weinberger: I move for a dismissal of the indictment as far as the other three are concerned, and that the jury be directed to acquit on the ground that there is no proof that any of these witnesses approached men between the ages of 21 and 30, inclusive, as alleged in the indictment, and that therefore there was no violation of law.

The Court: Denied.

Mr. Weinberger: I ask that as far as defendant Becker is concerned, there being no proof that he told people not to register, that he be acquitted; that there was no proof of conspiracy, that they conspired together, between the three of them, for the purpose of telling people not to register on June 5th.

The Court: Denied.

Mr. Weinberger: I make a similar motion as far as the defendant Walker is concerned, and the same motion as far as defendant Kramer is concerned.

The Court: Denied as to each.

Mr. Weinberger: An exception.

(Mr. Weinberger summed up to the jury on behalf of the defendants.)

(Mr. Content sums up to the jury on behalf of the Government.)

The Charge of the Court.

MAYER, *J.*:

Gentlemen of the Jury: I appreciate very much indeed the fact that you have sat here through two long days, but I should very much rather have enabled you to stay a little less each day if that were possible, but this is a very busy court, concerned with matters of more or less importance to the persons who find their way in this court, either on the civil or criminal side, and therefore we are not able, under the necessities of the situation, of expeditiously conducting the business of the court, to do that business in quite as leisurely a fashion as we should like.

I want to express my gratification at the outset, at the very close attention that you gentlemen have paid throughout this entire case, to the testimony and to the arguments of counsel. Both counsel say it is an important case. It is important. It is important to the Government and it is important to the defendants. And it is your purpose, I am sure, as it is mine, that whatever is just and right upon the evidence in the case shall be done.

Now, then, before I instruct you upon the technical points of law concerning which you should be advised, let me preliminarily make a few general observations, so that there may be no confusion in anybody's mind as to the nature of the indictments which have charged the defendants with a certain offense.

This country rests upon law and order. We are a republic. We can exist only so long as we continue to be a free people, obedient to law and order. The laws are made by the people acting through our system of representative government. Every man has a right to his opinion in regard to any law; and every man may, in any proper way, present arguments in favor of the repeal of some law in which he does not believe, but no man has a right to violate any law; and when Congress has

passed a law and the President has signed the act, that becomes the law of the land, and so remains until, if ever, a proper court declares that it is not a law, because such court declares it is unconstitutional.

These defendants do not stand indicted for the expression of any opinion. They do not stand indicted for entertaining any opinion. It is charged against them that they have conspired to violate one of the laws of the United States, and that in simple language is the subject-matter of the indictment with which you are concerned.

Now I will read only from one clause of the indictment which will typify, generally speaking, the character of this indictment. It is as follows:

"And the Grand Jurors aforesaid"—meaning the Grand Jurors of the United States—"on their oaths aforesaid, do further present that Louis Kramer, Morris Becker, Joseph Walker, and Louis Sternberg, hereinafter referred to as the defendants, all late of the City and County of New York, in the District aforesaid, heretofore, to wit: On the 18th day of May, in the year of our Lord, one-thousand nine hundred and seventeen, and on each and every day thereafter up to and including the date of the filing of this indictment, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously, did conspire together and agree among themselves and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States; that is to say, the said defendants unlawfully, wilfully, knowingly and feloniously did conspire together and agree among themselves and with said divers persons whose names are to the Grand Jurors unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of 21 and 30, both inclusive, being

subject to registration in accordance with regulations to be prescribed by the President and upon proclamation by the President and other public notice given by him and by his direction, stating the time and place of such registration, being under the duty as persons of the designated ages other than officers and enlisted men of the regular army, the navy and the national guard and naval militia, while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress approved May 18th, 1917."

Now, when the indictment says that on or about the 18th day of May, and each and every day thereafter, that is merely a legal form of saying that at some time on or subsequent to the 18th of May, they entered into the conspiracy with which they are charged.

Now let us see what these laws are. Section 37 of the United States Criminal Code is very simply worded; any business man can understand it:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Now, then, these men are charged with violating that section—with conspiring to commit an offense against the United States.

Now what is the offense which they are charged with conspiring to violate? The answer is, it is an offense to conspire to induce people to violate Section 5 of what is generally known as the "Selective Draft Act."

I will read as much of Section 5 as is necessary to present it to you. On May 18th, 1917, this so-called "Selective Draft Act" became law. It is

very simple and in Section 5—that is, this section is simple—it provides that:

"All male persons between the ages of 21 and 30, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President and upon proclamation by the President or other public notice given by him or by his direction, stating the time and place of such registration and it shall be the duty of all persons of the designated ages excepting officers and enlisted men of the regular army, the navy and the national guard and naval militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act."

And then later this same section says:

"Any person who shall wilfully fail or refuse to present himself for registration, or submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction, be punished" as the statute provides.

Now, therefore, the sole question with which you are concerned is on the evidence in this case. Has the Government satisfied you beyond a reasonable doubt that these men who remain in the case have conspired to induce people not to register as provided by Section 5 of the Selective Draft Act?

A conspiracy is not necessarily formed by two people coming together and in so many words agreeing unlawfully to do something. I shall read you and I shall also ask your close attention to what there is to be said to you by way of instruction on the question of conspiracy. One of the Justices of the Supreme Court has said:

"A conspiracy is a partnership in criminal purposes." Now I conceive, and I suppose that that in a sentence sums up really what is meant by a conspiracy, and yet I deem it my duty to give you a more elaborate definition: The word "conspiracy"

means a confederation or agreement to effect an unlawful object even by lawful means; or a lawful object if by unlawful means. The essence of conspiracy is agreement or confederation.

To constitute a conspiracy it is not necessary that the two or more persons should meet together and enter into an explicit or formal agreement; it is not necessary that they should by their words or in writing state what the unlawful plan or the unlawful means are to be, nor need there be set forth at length the details thereof, nor the methods by which the unlawful combination is to be made effective; it is sufficient if two or more persons in any manner or through any contrivance, even tacitly, come to an actual understanding, to accomplish a common, unlawful end or design. When the unlawful end is sought to be effected, and two or more persons, actuated by a common purpose to accomplish that act, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy although the part that some one of them was to take was a subordinate part or even was to be executed at a great distance from the other conspirator or conspirators.

So that two men might have a perfect understanding in New York and a third man might be in San Francisco, and if he came within the definition that I have just read, he, in San Francisco, might do his part in carrying out the conspiracy that was formed between all these parties.

A conspiracy is formed, and the foundation of crime is laid when tacitly or expressly the agreement is entered into to accomplish the result which the law forbids. For conviction, however, the statute requires not only that the mutual agreement shall have been made, not only that conspiracy shall have been intellectually formed, but that at least one of the parties to such unlawful agreement shall

actually do and shall really perform some act to effect the object of the conspiracy.

Therefore, to warrant a conviction in conspiracy, it must be found, first, that there was an agreement, that is, a conspiracy; second, that at least one of the conspirators performed some act to effectuate the object that they had in view; if that most essential feature be present, then all the persons who made the agreement or who entered it knowingly, after it was made, are guilty of conspiracy, no matter whether they all performed acts to effectuate its object or left active labors to others.

Now, in the case at bar, the evidence is that the defendants Becker and Kramer knew each other prior to the night of the Madison Square Garden meeting; that they belong to an organization known as the "No-Conscription League," which had certain papers or leaflets. It further appears that both of these defendants were in Madison Square Garden upon the night in question, and the evidence adduced by the Government is that a series of papers or leaflets was taken from each one of the four men who stand here indicted, some of these papers being that which is known as Government's Exhibit 1, and some of them which are known as Government's Exhibit 2.

Now, as to Walker, he has stated on the stand that he received a series, a number of these papers, from Kramer.

Kramer testifies that although he had Exhibit 1, he did not have Exhibit 2; that he had never seen Exhibit 2 except upon some occasion at some meeting when some man handed it to him and he read it and handed it back.

The witnesses for the Government have sworn, without qualification, that the exhibit in evidence, which has been spoken of as the bundle, was taken from Kramer; that his name was placed on it then and there, to identify it, and that that bundle contained both Exhibit 1 and Exhibit 2.

It has likewise been sworn to by the witnesses for the Government, that both No. 1 and No. 2 were found in the possession of Becker, and if my memory is right, Becker said he had a number of No. 2 in his pocket.

I might remark, in passing, that if my recollection of the facts differs from yours, your recollection is to control on the facts in question. But as to the law, you must be guided by what I say, because under our system the jury takes the law from the Court, while on the other hand the jury is the sole judge of the facts.

It is further testified that these leaflets, both 1 and 2, were given out by these defendants to various persons; and it is further testified that Kramer advised—I am not using the language—persons not to register, and in effect said that if persons liable to registration did not register in sufficient number, then in effect it would not be possible for the Government to carry out its plans. I am not concerning myself with the exact language, that you will remember.

Now, if you believe from the evidence in this case, that it was understood between these men, that they were to go that night to the Garden, and that persons were to be induced not to register, then what Kramer said binds all the defendants—that is, what Kramer said in respect to registration, because if you followed my definition of conspiracy, the moment that you are satisfied that the agreement existed which constituted the conspiracy, then the act of every one of the men is charged against every other man. And the reason that the law is so is, at least in part, because conspiracy is an insidious crime and a very difficult crime, sometimes, to discover; and in the administration of justice it has been found wise, through very many years, that the law should be that once the conspiracy is entered into, what each man does shall bind the others, because a different task in a conspiracy may be as-

signed to the different men who make up the conspirators.

Now, in regard to the two circulars, if you believe that these people had the agreement of which I have spoken, and if you believe the testimony that they were given out in regard to the two circulars, there is some differentiation:

Exhibit No. 1 is not in itself any violation of law. It may, however, be read in connection with all the facts in the case as an illuminant—if you think it is—of the intent of the defendants.

In regard to Exhibit No. 2, I shall submit that to you for your own construction. All of you are thoroughly familiar with the English language, and presumably are men of education, and you can determine the ordinary meaning of ordinary words. I shall not read it all, although you must determine the meaning, not only by the words themselves, but also by the context. One part of that circular reads as follows: "We will resist Conscription by every means in our power and we will sustain those who for similar reasons refuse to be conscripted."

And then again:

"Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the Government."

The first necessary step in our selective draft for putting it into operation was that by the provision of Congress men between certain ages should register. That was the preliminary to other provisions which will enable the responsible officers of the Government to assign those who are registered to such tasks as the statute provides for, and as the Government officials may deem proper within the authority conferred upon them; and so, as you know, without going into details, when the time comes the appropriate Government officials may determine who shall be utilized for service in the

army or navy, who shall be utilized for service in agricultural pursuits; and who shall be utilized for service in industrial pursuits; and who for one reason or another, provided for by the statute, shall be exempted from service.

Now, if, after you read these, you believe that that language in view of all the facts and circumstances disclosed by the evidence in the case—such evidence as you believe—amounted to advice not to register, but to fail wilfully to register, then this circular is within the definition of being an act, if distributed in the nature of advice, to disobey Section 5 of the Selective Draft Act. But if you should differ as to the meaning of that circular, and you believe there was an agreement between these men, and you are satisfied with what the Government witnesses have said as to Kramer stating to people not to register, then that is the overt act which is the second step in a conspiracy case: First, the agreement; second, the open act in furtherance of the wrongful agreement.

Now, when we come to determine the credibility of witnesses, you will apply that same good sense that you bring to bear in the daily affairs of your own lives. You are all of you accustomed to meeting men. It is a part of a man's life to attempt, at least, to read character. You know in your daily life the men that impress you as honorable, truthful men. You likewise have your ideas as to men in whose truth or veracity you do not believe.

In the Federal Courts, the Judge is permitted to comment on the facts, although the jury will take its own judgment of the facts, and the jury, as I said before, is the sole judge of the facts.

Now let us see, the witnesses for the Government are the police officer, Finan, and a number of these young men who have entered the military and naval service. You may ask yourselves what purpose or object they would have or had in swearing falsely upon this stand; what personal gain,

you may ask yourselves, would it be to them to invent in whole or in part any story as to the events of the night in question. You may take into consideration their appearance and the manner in which they impressed you as to whether they were upright men and told the truth; and you are at liberty in that connection to consider whether it is a mark of truth, that when men go on the stand and do not tell every detail which would go to make up a crime, that is some evidence at least as to whether or not they are telling the truth. You heard those men, they were subjected to examination and cross-examination, and it is for you to say in the making up of your judgment whether they were credible witnesses.

Every man is presumed to be innocent until the jury finds him guilty beyond a reasonable doubt; and that presumption attaches to these defendants, and they are entitled to that presumption. And in like manner you may determine from their manner and from what was developed out of their mouths, as to whether, upon the essential and crucial facts in the case, they did or did not tell the truth. You may take into consideration whether their testimony has been consistent, upon this trial, with such testimony as they gave before the Commissioner; and you may test their credibility by those ordinary rules of reason to which I have already referred.

I said that it is the duty of the Government to prove the guilt of any defendant beyond a reasonable doubt. I will read you a very brief definition of what I mean by reasonable doubt. I have often thought it defined itself in the minds of intelligent men, but yet it is my duty to endeavor to make clear what is meant by that expression in criminal cases. In criminal cases it is not sufficient to justify a verdict of guilty, that the weight of evidence may balance the scale against the accused rather than in his favor. The evidence must, however, so

preponderate as to leave no reasonable doubt of guilt. If the evidence justifies, in your judgment, that the accused or any of them be guilty, so as to exclude any other reasonable conclusion, you should declare them to be guilty. But if, after consideration, you can reconcile the evidence before you with any reasonable hypothesis consistent with innocence, you should do so and find the defendants or any of them not guilty. This old established and indeed ancient rule does not permit to you, however, a mere sentiment or guess or conjecture that the accused, or any of them, are possibly innocent; you cannot base your judgment upon a merciful hope; for a reasonable doubt, as the words imply, is a doubt, such a doubt as would be entertained by a reasonable man after an impartial and thorough review of all the evidence and all the facts in the case brought to his attention. If, after such review and consideration, you can honestly say that you are not satisfied that the defendants are guilty, then you have a reasonable doubt. If, on the other hand, you have a settled opinion, an honest belief that the accused are guilty, and that opinion is of the degree of certainty that you would require in acting upon the most important affairs of your own life, then you have no reasonable doubt.

Now, in a conspiracy case, gentlemen of the jury, you must find that there was an agreement between two persons. If you so find, you are at liberty to convict such of the persons indicted as were parties to that agreement. If you believe, however, that any one of the three here indicted was not a party to the agreement, then that person is entitled to an acquittal.

I think it is only fair for me to explain to you the difference between the case of Sternberg, whom you acquitted by my order, and Walker:

In Sternberg's case there was no evidence whatever, as a matter of law, of his entering into the alleged conspiracy. In Walker's case there was some

evidence. But in regard to that, if you feel that Walker did not know, when these pamphlets were handed to him, what they were, and had had no part in the arrangement which had to do with advising people not to register, then you will acquit Walker. In other words, if Walker upon that evening was a mere accidental instrument without knowledge, then he is entitled to be acquitted.

I think it is only fair to say that in regard to all three defendants, which includes Walker, you are to give the case of each defendant separately, as well as the case of the three jointly, careful consideration. If you should regard any one of them as innocent, or at least that the Government has not satisfied you beyond a reasonable doubt of his guilt, you are at liberty to acquit that one. If you should think any two of them have so acted, namely, that the Government has satisfied you beyond a reasonable doubt as to their guilt, it is your right and your duty to convict those two and acquit the one in regard to whom you have a reasonable doubt.

There is no obligation upon the part of any defendant to produce witnesses as to his good reputation, and the failure so to do as a matter of law does not affect the right of any defendant. It is fair to say, however, as to Walker, that the testimony is that he has been employed for some thirteen years as a printer, and that the secretary of the union with which he was connected came upon the stand and testified that he had a good reputation for veracity.

Now, gentlemen, I want you to take this case, as I know you will, with the same earnestness with which you have listened to it. I do not for a moment ask any man on this jury to give up any conscientious convictions that he may have in regard to the guilt or lack of guilt of these defendants. I do ask you, however, to make every conscientious and honorable effort to agree upon a verdict. If there should be a difference of opinion among you,

you are entitled to discuss the matter temperately, deliberately, each of you presenting to the other such views as you may have. If you thus approach the consideration of this case, you will approach it with a mental attitude which will undoubtedly result in a verdict that will be just on the evidence, and with these instructions I commit the case to you.

Mr. Weinberger: May I ask the Court to charge that the fact that two of these defendants are anarchists and opposed to governments and law should not prejudice the jury against them, and that they should not find them guilty of conspiracy because they believe in anarchy and no government.

The Court: I so charge.

Mr. Weinberger: I ask your Honor to charge the jury that there is no evidence that either or any of the defendants approached men between twenty-one and thirty years, inclusive, and asked them to refuse to register.

The Court: I decline to so charge. I leave the evidence in the case to the jury, and I further charge that there is no necessity, in law, of proving the age of any person who was approached by any of these defendants, if the jury believe that such persons were approached.

Mr. Weinberger: I respectfully except. I ask the Court to charge the jury that assuming that two or more of the defendants conspired to induce people not to register, that they must find, in addition, that they committed an overt act to carry that conspiracy out in order to find them guilty.

The Court: I have already charged that very fully.

Mr. Weinberger: That if there was a conspiracy to give out the leaflets only, and if the jury should believe that Kramer went over there and told people not to register, the defendants, including Kramer, are not guilty of conspiracy.

The Court: I decline to so charge.

Mr. Weinberger: I respectfully except. I ask the Court to charge that inasmuch as in the public mind and in the public press and from the use of English to-day registration and conscription are two separate and distinct things, I ask the Court to charge as a matter of law that People's Exhibit 2, if they believe the defendants to have given them out, is not a violation of law.

The Court: I decline to charge as requested.

Mr. Weinberger: I respectfully except. I ask the Court to charge that the mere fact that the defendant told people to resist the conscription, and assuming that they conspired to give these out, that that is not sufficient to convict, inasmuch as the charge here is that they conspired to tell people not to register.

The Court: I decline to charge as requested, and repeat that the jury follow the instructions heretofore given upon the facts as they may find them.

Mr. Weinberger: I respectfully except. I ask the Court to charge that the defendant is presumed to be innocent until the contrary is established beyond all reasonable doubt.

Mr. Content: Your Honor has already charged that.

The Court: I have already so charged.

Mr. Weinberger: I ask the Court to charge that the presumption of innocence is not a mere phraseology, but that the jury is bound to entertain it conscientiously, sincerely and ungrudgingly, and that on the question of reasonable doubt, that if there is one, they have to give the defendants the full benefit of it.

Mr. Content: Your Honor has already charged on that.

The Court: I have so charged and charge it again.

Mr. Weinberger: I ask your Honor to charge that where a reasonable doubt of the defendants' guilt is entertained by any one juror, that the defendants cannot be found guilty.

The Court: That is like saying two and two are four.

Mr. Weinberger: I believe that the proposition is that sometimes one juror having an opinion——

The Court: I have already charged reasonable doubt very fully.

Mr. Weinberger: I respectfully except to the Court's denial. I ask the Court to charge that if the conspiracy was formed, and not for the purposes charged in the complaint, in other words, if the defendants conspired to do something else, and any of them did something different, then that the defendants—none of them would be guilty of a conspiracy under the law.

The Court: I fully charged on conspiracy. I have no desire at this time to confuse the issues.

Mr. Weinberger: I respectfully except. I ask your Honor to charge that in weighing the circumstantial evidence from which the jury must take their conclusions as to whether or not there was a conspiracy that first they must believe that the circumstances themselves were fully established; second, that all the circumstances are consistent with the guilt of the defendant; third, that the circumstances should be of a conclusive nature tending to prove the guilt of the defendant; fourth, that it is essential that the circumstances should point, in the minds of the jury, to the guilt of the defendants.

The Court: I have fully charged on the question of reasonable doubt, and I do not propose to confuse that charge.

Mr. Weinberger: I ask the Court to charge that in the case of circumstantial evidence, and this is a case that is——

Mr. Content: This is a case of direct evidence.

Mr. Weinberger: Direct evidence? Perhaps if you believe——

The Court: Do not argue.

Mr. Weinberger: May I make it clear, your Honor, both to Mr. Content and——

The Court: No, no, you make your requests and I will rule.

Mr. Weinberger: I request your Honor to charge the jury that the mere fact that there is direct evidence of the overt act, that it still leaves the question of conspiracy one of circumstantial evidence, and that the proof ought to be not only circumstantial of the guilt of the prisoners, but inconsistent with any other rational conclusion.

The Court: I fully charged on conspiracy.

Mr. Weinberger: I respectfully except to your Honor's refusal to charge this. I ask your Honor to charge that where a conviction for the crime of conspiracy is sought, as in other criminal cases, the jury must acquit, if upon any reasonable hypothesis they can reconcile the evidence with the defendants' innocence.

The Court: I have already charged that.

Mr. Content: You charged on reasonable doubt.

Mr. Weinberger: I respectfully except. I have just two more. I ask your Honor to charge that the confederating together is so necessary as a constituent element of the crime that it has been held that several persons may simultaneously actually do, without incurring liability, and punishment, that which, if it were the object of a preconcerted design, they could not have done and an attempt to do would render the participants legally guilty of conspiracy.

The Court: I see no occasion to amplify my charge on conspiracy.

Mr. Weinberger: I respectfully except to your Honor's refusal to charge. I ask your Honor to charge—nor will evidence that each of several defendants acted illegally with the same end in view support a charge of conspiracy unless it appears that such acts were done pursuant to a mutual agreement.

The Court: I have charged it and I charge it again.

Mr. Weinberger: My last request is that several persons may simultaneously actually do, without incurring the law of punishment in reference to conspiracy, that which, if it were the object of a preconcerted design, thought, not done or attempted, would render the participants liable to indictment for conspiracy, nor will evidence that each of several defendants acted illegally or maliciously with the same end in view support the charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.

The Court: So charged. The jury may retire. Gentlemen, if you want to take your lunch before considering the case just let the marshal know.

(A marshal was sworn and the jury retired.)

(The jury retired.)

(The jury returned, and the foreman announced the verdict as follows):

"Walker, Not guilty. Becker and Kramer, Guilty, with recommendation to your Honor's clemency."

The Court: Gentlemen of the Jury, you have, in my opinion, rendered a just verdict, and I believe you will have occasion to look back with satisfaction upon the service you have rendered as jurymen.

Mr. Weinberger: I move to set aside the verdict as contrary to the evidence, contrary to the law; and I move to set aside the verdict, as far as defendants Kramer and Becker are concerned, on behalf of each individually and both together, as contrary to law and contrary to the evidence, and on all the grounds mentioned in the Criminal Code.

The Court: Denied.

Mr. Weinberger: I respectfully except.

The Court: What about sentence?

Mr. Content: I think, if I might suggest to your Honor, that sentence should go over to await the outcome of the case against Kramer alone.

The Court: What do you desire?

Mr. Weinberger: I think that it would be best to have sentence postponed until to-morrow.

THE SENTENCE OF THE COURT (MAYER, *J.*).

The Court: Kramer, you have been convicted by a jury on an indictment for conspiring with others to induce persons to violate a statute of the United States, namely, to violate the statute providing for registration of males between certain ages.

Under some circumstances, the Court feels impelled to accept a recommendation for mercy, but whether mercy shall be extended or not is a matter entirely within the discretion of the Court. There is no duty imposed upon a jury in that regard. The duty is the Court's duty, and the Court must perform its duty in accordance with its best judgment.

The offense of which you have been convicted, and the facts developed in the testimony do not call for mercy in your case. The offense is of a character when committed, as it was by you, defiantly and brazenly, which does not call for gentle, merciful treatment—it calls for severe treatment. The sentence which should be imposed upon you, should be the kind of sentence which not merely punishes you, but shall be exemplary, so that all the world may know that the administration of justice by the courts of the United States will not tolerate offenses of that character, and will not tolerate merciful consideration to men who are defiant as you are. The case would be quite different of some young person who had some conscientious scruples, and who in other respects was an obedient American citizen, or an obedient alien to our laws. You say you have a right to obey or disobey as pleases you. You have mistaken the country in which you have been privileged to come. This is a country

founded on democracy and a republic where free men live, because free men will obey the will of the majority expressed through duly constituted representatives.

On the stand you uttered brave words: You were willing that you should be shot before you obeyed the laws of this country; but I noticed what is quite characteristic of men like you, that you took very good care to deny, by perjured testimony, every piece of testimony that had to do with the essential features that would tend to your conviction; and your brave words became the perjured testimony of a coward, and that is quite characteristic of a man like you. You talk a lot, but when the time to carry out your conviction comes, you are a craven.

Now, we do not propose to tolerate such men as you. You came here, as you say, when you were a year old. You speak and understand English as well as a native born. Such education as you got, you got in this country, afforded to you by a free people, by the contributions of earnest, industrious, law-abiding citizens, who make it possible for you to live here and to be educated.

Now, I know perfectly well that you will be unable to pay a fine. The extreme penalty under the law for the offense for which you stand convicted is two years imprisonment and $10,000 fine, and I propose to make that your punishment, so that all men shall know that you have been punished with the full and complete punishment provided by the statute.

I sentence you to be imprisoned in the United States Penitentiary at Atlanta for two years and to pay a fine of $10,000.

Now, Becker, in regard to you I am going to take into consideration the recommendation of the jury to some extent. Your attitude on the stand was, to my mind, quite to be differentiated from that of Kramer. You announced your views, it is true, but at the same time in respect of the essential

features of the testimony, you adhered much more closely to the truth than did Kramer. You frankly told us that you had some of those so-called exhibits, the Exhibit No. 2, on your person, and while you were subject precisely to the same condemnations that are contained in the words that I addressed to Kramer, I will take into consideration that your attitude in a slight extent differed, and that your testimony in the main was much nearer the truth than Kramer's. At the same time, for the reasons that I have indicated, I regard you, equally, as a public menace, and you will begin to understand, when I impose my sentence, that there are laws in this country, and neither you nor any other man has a right to disobey them.

I sentence you to the United States Penitentiary at Atlanta for one year and eight months.

The foregoing contains all of the testimony given at the trial, and all of the foregoing proceedings were had and exceptions taken and noted by the Court before the jury retired to consider of its verdict, and because the same would otherwise not appear of record the defendants pray the Court to sign this, their bill of exceptions, to have the same force and effect as to each of said exceptions as though the same were set forth in a separate bill of exceptions, which is granted; and, accordingly, the Court signs defendants' bill of exceptions, to have the force and effect aforesaid, now for then, this 10th day of September, 1917.

JULIUS M. MAYER,
Judge.

Notice of settlement waived September 8th, 1917.

FRANCIS G. CAFFEY,
U. S. Attorney, S. D. of New York.

Government's Exhibit 1.

NO - CONSCRIPTION

MASS MEETING

on the eve of registration

Monday, June 4, 8 P. M.

HUNTS POINT PALACE

953 So. Boulevard
One Block from Simpson St. Subway Station
All Bronx Cars Transfer



Auspices of No-Conscription League
of New York

SPEAKERS: Emma Goldman; Alexander Berkman; Louis Baury; "Mother" Yuster; Mrs. Stella Comyn Ballantine; Mrs. Shapiro; Leonard D. Abbott; Kate Siebel; Rose Yuster; Robert H. Hutchinson; Louis C. Fraina; Winter Russel and others, among them young men of conscriptable age.

Doors open 7 P. M.

Admission Free *Box Seats* 25c

Mothers, Fathers, Sons—Turn Out in Protest
Against Conscription!

Government's Exhibit 2.

NO CONSCRIPTION!

Conscription has now become a fact in this country. It took England fully 18 months after she engaged in the war to impose compulsory military service on her people. It was left for "free" America to pass a conscription bill six weeks after she declared war against Germany.



What becomes of the patriotic boast of America to have entered the European war in behalf of the principle of democracy? But that is not all. Every country in Europe has recognized the right of conscientious objectors—of men who refuse to engage in war on the ground that they are opposed to taking life. Yet this democratic country makes no such provision for those who will not commit murder at the behest of the war profiteers. Thus the "land of the free and the home of the brave" is ready to coerce free men into the military yoke.

No one to whom the fundamental principle of liberty and justice is more than an idle phrase, can help realize that the patriotic clap-trap now shouted by press, pulpit and the authorities, betrays a desperate effort of the ruling class in this country to throw sand in the eyes of the masses and to

blind them to the real issue confronting them. That issue is the Prussianizing of America so as to destroy whatever few liberties the people have achieved through an incessant struggle of many years.

Already all labor protective laws have been abrogated, which means that while husbands, fathers and sons are butchered on the battlefield, the women and children will be exploited in our industrial bastiles to the heart's content of the American patriots for gain and power.

Freedom of speech, of press and assembly is about to be thrown upon the dungheap of political guarantees. But crime of all crimes, the flower of the country is to be forced into murder whether or not they believe in war or in the efficacy of saving democracy in Europe by the destruction of democracy at home.

Liberty of conscience is the most fundamental of all human rights, the pivot of all progress. No man may be deprived of it without losing every vestige of freedom of thought and action. In these days when every principle and conception of democracy and individual liberty is being cast overboard under the pretext of democratizing Germany, it behooves every liberty-loving man and woman to insist on his or her right of individual choice in the ordering of his life and actions.

The No-Conscription League has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men. The No-Conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:

> We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.

We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.

We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.

We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.

We are not unmindful of the difficulties in our way. But we have resolved to go ahead and spare no effort to make the voice of protest a moral force in the life of this country. The initial efforts of the conscientious objectors in England were fraught with many hardships and danger, but finally the government of Great Britain was forced to give heed to the steadily increasing volume of public protest against the coercion of conscientious objectors. So we, too, in America, will doubtless meet the full severity of the government and the condemnation of the war-mad jingoes, but we are nevertheless determined to go ahead. We feel confident in arousing thousands of people who are conscientious objectors to the murder of their fellowmen and to whom a principle represents the most vital thing in life.

Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the government. Help us to publish literature against militarism and against conscription.

We consider this campaign of the utmost importance at the present time. Amid hateful, cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York.

Government's Exhibit 3.

Bundle of circulars similar to Government's Exhibits 1 and 2 taken from Louis Kramer.

Government's Exhibit 4.

Bundle of circulars similar to Government's Exhibits 1 and 2 taken from Joseph Walker.

Government's Exhibit 5.

Bundle of circulars similar to Government's Exhibits 1 and 2 taken from Morris Becker.

Government's Exhibit 6.

Bundle of circulars similar to Government's Exhibits 1 and 2 taken from Louis Sternberg.

Assignments of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER and MORRIS BECKER,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

Now comes the above-named Louis Kramer and Morris Becker, plaintiffs-in-error, by their attorney, and make and file the following assignments of error upon which they will rely upon the prosecution of the writ of error to the Supreme Court of the United States sued out by them herein to review the errors committed in the above-entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against them in the said court.

That the District Court erred as follows:

FIRST: In not dismissing the indictment herein, upon the ground that the same did not charge the defendants with any offense against the United States or any law thereof, in that it is not a violation of any law for defendants to have conspired and agreed among themselves and with other persons to aid, abet, counsel, command, induce and procure divers persons subject to registration and submit thereto in accordance with "An act to authorize the President to increase temporarily the military establishment of the United States," approved the 18th day of May, 1917.

SECOND: In not granting the motion to arrest judgment on the ground that the indictment did

not charge an offense against the United States or any law thereof.

THIRD: In not setting aside the verdict upon the ground that the facts proved did not constitute an offense against the United States or any law thereof.

That the District Court erred in the construction and application of the Constitution of the United States and in the disposition of the merits of the case as follows:

FOURTH: In denying the defendants' motion made at the opening of the trial to dismiss the indictment upon the ground that the same did not charge the defendants with any offense against the United States or any law thereof upon the following grounds:

1. That there can be no conspiracy to violate the law entitled "An act to authorize the President to increase temporarily the military establishment of the United States," approved May 18th, 1917, also known as "The Conscription Law," in that the said Act is unconstitutional upon the following grounds:

A. It violates Section 13, Subd. 1 of the Amendments to the United States Constitution, which reads as follows:

> "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction."

The said law imposes military, agricultural or industrial service, under any conditions determined by the military or Congress as to hours, conditions and pay, on all male persons in the United States between the ages of twenty-one and thirty, both inclusive, excepting officers and enlisted men of the regular Army, the Navy, the Marine Corps, and the

National Guard and Naval Militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service.

B. It violates Article I of the Amendments to the United States Constitution, which reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

That this "Conscription Law" does establish a religion in that it gives a special privilege to members of "any well recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations," and it prohibits and invades the free exercise of the religion of any and all individuals not belonging to "any well recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation in accordance with the creed or principles of said religious organizations."

C. It violates Article I of the United States Constitution, Section 8, Subd. 15 and 16, which provides:

> "That Congress shall have power (Subd. 15) to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions (Subd. 16). To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respec-

tively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

That neither an invasion nor a rebellion is taking place, and further that the law does not call the Militia, but calls upon all male persons with certain exceptions between the ages of twenty-one and thirty years inclusive.

D. It violates Article I, Section 8, Subd. 12, of the Constitution, which reads as follows:

> "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

E. It violates Article IV, Section II, Subd. I, of the Constitution, which reads as follows:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

That the said law imposes military, agricultural or industrial service on all male citizens between the ages of twenty-one and thirty years inclusive, with certan exceptions, thereby excluding the excepted classes and older and younger males.

F. It violates Article V of the Amendments to the Constitution, which reads as follows:

> "No person shall * * * be deprived of life, liberty or property without due process of law."

FIFTH: In denying the defendants' motion to dismiss the indictment herein or to instruct the jury to acquit the defendants made at the conclusion of the case as presented by the United States upon the grounds contained in the first assignment of error, and upon the further ground that the indictment does not charge a crime; that upon all the facts proven the defendants are not guilty; that there is no proof that the defendants conspired un-

lawfully, wilfully, knowingly, feloniously together and with divers persons and did agree among themselves and with the said divers persons to aid, abet, counsel, command, induce and procure divers persons, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations prescribed by the President to unlawfully and wilfully fail and refuse to present themselves for registration and submit thereto; that there is no proof of any overt act to carry out the said conspiracy.

SIXTH: In denying the defendants' motion to set aside the verdict of the jury rendered against them, which motion presented to the trial court was as follows: That the verdict was contrary to the evidence, contrary to the law.

SEVENTH: In denying the defendants' motion for an arrest of judgment upon all the grounds hereinbefore set forth.

WHEREFORE, the said Louis Kramer and Morris Becker, plaintiffs-in-error, pray that the said judgment herein for the errors aforesaid and for the errors in the record and proceedings herein may be reversed and altogether held for nothing, and that their said trial should go for naught and that the said plaintiffs-in-error may be restored to all things which they have lost by reason of said judgment, and for such other and further relief as to the Court may seem proper.

Dated, July 17th, 1917.

HARRY WEINBERGER,
Attorney for Louis Kramer
and Morris Becker,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
New York City.

Petition for Writ of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, against LOUIS KRAMER and MORRIS BECKER, Defendants.	Petition for Writ of Error.

Now comes the above defendants, Louis Kramer and Morris Becker, by their attorney, and complain that on the 13th day of June, 1917, the District Court of the United States for the Southern District of New York gave judgment in the above-entitled cause against the defendants, in which judgment in this cause certain errors were committed to the prejudice of these defendants.

FIRST: In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause, all of which will appear more in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, the said defendants, Louis Kramer and Morris Becker, pray for the allowance of a writ of error and for such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected, the said Jus-

tices of the said Supreme Court of the United States cause further to be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said Writ of Error by the said Supreme Court of the United States.

And your petitioners will ever pray, etc.

Dated this 17th day of July, 1917.

HARRY WEINBERGER,
Attorney for Defendants Louis
Kramer and Morris Becker,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
City of New York.

SUPERSEDEAS.

Writ of Error, to operate as a Supersedeas, allowed, returnable, according to law, the defendants to furnish bail in the sum of Ten Thousand ($10,000) Dollars each, conditioned according to law, subject to the approval of one of the Judges of the United States District Court for the Southern District of New York.

Dated, July 19th, 1917.

LOUIS D. BRANDEIS,
Associate Justice of the United
States Supreme Court for
the Second Circuit.

Citation.

UNITED STATES OF AMERICA, SS.:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Louis Kramer and Morris Becker are plaintiffs-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiffs-in-error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the
Supreme Court of the
United States.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER and MORRIS BECKER,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Southern District of New York:

Writ of Error and order allowing same, dated July 19th, 1917.

Indictment, filed June 4th, 1917.

Bill of Exceptions, dated September 10th, 1917.

Assignment of Error, dated July 17th, 1917.

Petition for Writ of Error and supersedeas endorsed thereon, dated July 19th, 1917.

Citation, dated July 19th, 1917.

Stipulation Settling Record.

Certificate, dated September 10th, 1917.

Dated, New York, September 11th, 1917.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-in-Error.

Stipulation Settling Record.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER and MORRIS BECKER,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, September 11th, 1917.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-in-Error.

Clerk's Certificate.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER and MORRIS BECKER,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregong is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, in the City of New York, in the Southern District of New York, this [illegible] day of September, in the year one thousand nine hundred and seventeen.

(Seal) ALEXANDER GILCHRIST, JR.,
Clerk.

Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1916

No. 681

LOUIS KRAMER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 13, 1917.

(26148)

Supreme Court of the United States

OCTOBER TERM, 1917.

No. .

LOUIS KRAMER, PLAINTIFF-IN-ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Writ of Error and Order Allowing Writ of Error.

UNITED STATES OF AMERICA, SS.:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Louis Kramer, Defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of
the United States.

(Seal)

Allowed by

LOUIS D. BRANDEIS,
Associate Justice of the Supreme
Court of the United States.

Indictment.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City and County of New York, within and for the District aforesaid, on the first Tuesday of May in the year of our Lord one thousand nine hundred and seventeen, and continued by adjournment to and including the 6th day of June in the year of our Lord one thousand nine hundred and seventeen.

SOUTHERN DISTRICT OF NEW YORK, ss.: The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath present that on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen the President of the United States of America duly issued his Proclamation as provided by the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," in which said Proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several States and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7 A. M. and 7

P. M. on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular army, the navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Louis Kramer, late of the City and County of New York, in the District aforesaid, heretofore, to wit, on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the Southern District of New York and within the jurisdiction of this Court, being a male person between the ages of twenty-one and thirty, both inclusive, and being subject to registration in accordance with the regulations prescribed by the President, and upon Proclamation by the President and other public notice given by him and by his direction, stating the time and place for such registration, being under the duty as a person of the designated ages other than an officer and enlisted man of the regular army, the navy, and the National Guard and Naval Militia, while in the service of the United States, to present himself for and to submit to registration under the provisions of the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," unlawfully and wilfully did fail and refuse to present himself for registration and to submit thereto, as provided by the said Act of Congress approved May 18, 1917, and in accordance with the regulations prescribed by

the President in his Proclamation duly issued on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (Sec. 5 of the Act of May 18, 1917.)

FRANCIS G. CAFFEY,
United States Attorney.

(Indictment Endorsed:)

C 9-436. U. S. District Court—United States of America vs Louis Kramer.—Indictment—Wilfully Failing to Register and to Submit Thereto. Sec. 5, Act of May 18, 1917. Francis G. Caffey, U. S. Attorney. A True Bill: Frank B. Taylor, Foreman. U. S. District Court, S. D. of N. Y., Filed Jun 6, 1917.

1917:

Jun 6 Defendant pleads Not Guilty. Bail $2500. Mayer D. J.
6 Filed Demurrer.
6 Demurrer overruled.
11 Defendant Pleads Not Guilty. Mayer D. J.
13 Trial begun. Jury Sworn. Verdict Guilty as charged. Sentence One year Mercer County Jail, Trenton N. J. Mayer, D. J.

Defendant's Bill of Exceptions.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

LOUIS KRAMER,
Defendant.

This cause came on for trial at the June, 1917, Term, before the Honorable Julius M. Mayer, judge, and a jury, the United States (hereinafter called Government) being represented by Messrs. Francis G. Caffey, United States Attorney, and Harold A. Content, Assistant United States Attorney, and the defendant represented by Harry Weinberger, Esq., and thereupon the following proceedings were had and testimony given:

A jury was duly impaneled and sworn.

Mr. Weinberger: Of course, I appreciate, on the argument before your Honor on the demurrer under this indictment, your Honor's opinion, but I think that I ought to have on the record, first, a motion to dismiss this indictment at this time and to briefly state my various points for moving therefor.

The Court: Have you it all written out?

Mr. Weinberger: No; I have it in rough notes; I was trying to get it out this morning.

That it violates Section 13 of the Constitution, which provides against slavery or involuntary servitude. We must take the

words as used in the Constitution as it is understood by dictionaries and grammarians. I am going to make each point very short.

The Court: Just simply state the grounds, because we have argued it fully, and I see no especial view in arguing.

Mr. Weinberger: Just one or two points I will go into very fully that I did not raise before your Honor.

The Court: All right.

Mr. Weinberger: That the word "servitude" means, as you find in the Century Dictionary and the dictionary's synonyms, "As service in a military or naval force"; and, therefore, the words "involuntary servitude" mean "involuntary service in the army and in the navy," and, therefore, the conscription law and also the requirements of registration for the conscription law are a violation of that specific section of the Constitution.

My second and third point is that it is a combination of Church and State, and so infringes the religious belief of the people of the United States. The history of Church and State is the history of certain churches being given special privileges, whether of exemption, whether of a matter of a collection of part of the taxes, or whether a recognition of a specific state church or the exemption by the clergy of the right not to be tried by civil authorities, as, for instance, in the days of England the right of clergy, which meant anyone who could read or write, or who was or was not a minister, could absolutely not be tried by the civil authorities, but had to be tried by the religious authorities.

Therefore, this law, which practically allows a certain recognized church, sect or organization to have an exemption, means that for the first time in the history of the United

States the Government of the United States recognizes a religion, recognizes that they are entitled to exemption from privileges not given to any other sect or church. That this practically infringes individual religious belief, and has a tendency to force people to join that church in order to get the protection of the Constitution which is guaranteed to all.

My fourth point is that it calls upon citizens when neither an invasion nor a rebellion is taking place. The Constitution says that the President may call upon the citizens for their militia during the time of an invasion or a rebellion, and that now neither an invasion, rebellion nor an insurrection is taking place—that is, at the present time—and, therefore, the United States Government has no power to conscript or call upon individual citizens, certainly has not the power to call upon individual citizens directly; that the right to conscript men, if it shall be assumed that the Government has a right to conscript men between the ages of twenty-one and thirty, that it certainly could also have the right to conscript men between the ages of eighteen and forty-five, and in that manner do away entirely with State militia, and thus invade the State sovereignty.

The sovereign States specifically kept to themselves under the Constitution the right to have a militia, and the United States Government was only allowed to call upon the States for that militia under certain circumstances—and those circumstances not having arisen, the United States cannot call for the militia, nor call upon individual citizens without getting them through the Government.

Mr. Content: I might observe that I think your Honor is bound by the opinion of Judge Mayer in the case of Kramer and others, tried previously.

Mr. Weinberger: I admit it is bound, but there are one or two other points that I have raised in addition to those raised before your Honor.

It violates Section 8, Subdivision 12, and that has reference to raising and supporting armies, and that no appropriation of money to that use shall be for a longer period than two years. The purpose of that was that the American Colonists knew that continued standing armies were always a danger to democracy, but they felt that by limiting the appropriations to the period of two years they could at the end of two years elect a new House of Representatives and get rid of the standing army in that way; but the war appropriation at this time of more than two billions is extended over a period of thirty years—absolutely in violation of the Constitution. The loan itself is absolutely unconstitutional. The bonds are unconstitutional and beyond the power of Congress, and, therefore, this conscription act—that is, the soldiers that would be conscripted under this act, inasmuch as they will be paid out of this loan covering a period for more than thirty years—is a specific violation of Section 8, Subdivision 12, which says that no appropriation of money shall be for a longer period than two years.

The Court: Is there anything more?

Mr. Weinberger: Just two things, and I am through. One in particular is more fully than I raised before your Honor.

It denies the defendant the equal protection of the law, in that it picks out specifi-

cally men between the ages of 21 and 30, inclusive, exempts all others, and under this law at the present time men may not only be taken into the military arm of the Government, but all men between the ages of 21 and 30, inclusive, may be drafted for the purposes of agriculture or industrial work—absolute slavery in every view of the word, in every meaning of the word, because if the Government can conscript men and force them into not only military but clerical and agricultural and industrial work for one year or a few years, they can do it for the rest of their lives, and in that the law makes it that they shall be absolute slaves, because under this section sending men to agricultural or industrial work under any conditions that the Government may see fit, without the protection of the labor laws, and with the payment of an ordinary soldier in active service is a violation of the individual rights, is class legislation, and the picking out of these men is contrary, therefore, to the Constitution.

My last point is that it permits the Government to send men outside of the United States. The Constitution, of course, must be —and I assure the Court that this is a new point; of course, the other points were merely for the purpose of the record: That the sending of men beyond the borders of the United States was never given to the United States Government by the Constitution. If we look at the laws— —

The Court: What provision of the Constitution are you talking about?

Mr. Weinberger: The one which guarantees life and liberty to the defendant, and, therefore, it is a common law——

The Court: What section are you talking about?

Mr. Weinberger: I asked my friend to get me the Constitution on that and I hurried over it, but I have not been able to put my finger right on it.

The Court: There is some provision somewhere on that subject in the Constitution.

Mr. Weinberger: There is some provision somewhere in the Constitution about that.

The Court: I see.

Mr. Weinberger: We can construe this Constitution——

The Court: Don't let us spend any time on that.

Mr. Weinberger: This is very short, and this is the last point I have.

The Court: It is so obviously not applicable that I think it will conserve the time of everybody if we don't spend any more time on it.

Mr. Weinberger: I know your Honor has practically ruled on this in the demurrer that I had before your Honor, but I think that we ought to have it on the record.

Mr. Content: The point is on the record already.

The Court: The point is on the record.

Mr. Content: I do not see anything in argument on it; there is no use of that.

Mr. Weinberger: It will only take an additional minute or two at the outside.

The Court: Go ahead.

Mr. Weinberger: The Colonists, of course, in fighting England, said——

The Court: Just a minute. Let me make something perfectly plain: I don't want a stump speech; I want a terse statement of a point of law.

Mr. Weinberger: I am going to do so.

The Court: State your point fully.

Mr. Weinberger: I stated my point of law, and I am going to quote Blackstone. Blackstone made a stump speech, and it is good law.

The Court: Blackstone is no authority on the Constitution of the United States.

Mr. Weinberger: Blackstone is authority on what the common law was at the time of the adoption of the Constitution of the United States.

The Court: You can put on the record any quotation from Blackstone you desire.

Mr. Weinberger: I ask just for two moments to put that particular point on.

The Court: Go ahead; I suppose the shortest way is to let you do it.

Mr. Weinberger: At the time of the adoption of the Constitution and the fighting with England, even then was to get all the rights of government, and one of the rights of government as laid down by Blackstone at that time was that no power on earth can take any subject of England out of the land against his will, not even a criminal. I omitted the words "except by Act of Parliament," because Parliament is not limited and was not limited by any constitution—any written constitution. We are. That no one in those days had any right to send men outside the state, though Parliament had acted, and we find at the present time, even though England has her conscription law, that not a single man has been sent to the front except a volunteer; conscripted men are kept at home, and yet under this section we absolutely can send these men out of the State, out of the country, to the battlefields of Europe; and as the President states that we are in this war for democracy——

The Court: Now, I won't allow all this.

Mr. Weinberger: I want to quote the preamble to the Constitution.

Mr. Content: Your Honor knows the preamble.

The Court: I do not propose to have it quoted. I am familiar with it, and I am not going to waste any time with stump speeches in the court room. Now, that is all there is to that, and you come right down to the law of the case and the facts.

Mr. Weinberger: I object to your Honor's remarks in regard to that being a stump speech; I was making my legal point in a regular way and making it as short as I can.

The Court: This talk about what is going on in England has nothing to do with this case.

Mr. Weinberger: It has something to do with construing the Constitution in this way——

The Court: It has nothing at all to do. If you have got any points you wish to make, make them, to safeguard your client, make them from that standpoint, and in the form of a motion, if you have any to present to the Court, or points of law.

Mr. Weinberger: That is what I am doing.

The Court: I will not permit this court room to be a forum for speechmaking. It is not going to be permitted.

Mr. Weinberger: Your Honor's opinion and my opinion as to a stump speech, of course, differ, but I thought I was specifically referring to sections of the Constitution which are very much in point under the conscription law.

The Court: Now, I am going to give you the last statement on this subject: I have told you that it is your right to raise any

point that you desire that is a point of law, which you may want to make to safeguard your client's interests, and you may call attention to any provision of the Constitution or to any statute or to any provision of law which you desire, but I will not have and will not permit general talking about what is going on in some other country and similar matters. We are concerned here with a very simple issue, and that is whether or not this defendant wilfully refused to register under Section 5 of the statute in question. That is all there is to this case, and I will not permit this case, or any other, for that matter, to be a vehicle for making speeches in the court room.

Mr. Weinberger: Just at the present moment we are arguing the constitutionality of the law, and I presume, even though that is true, that this Court, as you know, said he will not pass on the constitutionality of it, or what is before him, and in view of that condition——

The Court: I never made any such statement. I held on demurrer in this very case that the alleged constitutional points were of no value, and I have held the law constitutional. I specifically pointed out to you from the bench, when that question was argued, that I was not concerned with what you were pleased to call or tried to place within the issue, but I am only concerned as a judge with passing on the question presented to me. I have ruled. I repeat, and say this in great sincerity and earnestness, that I am not going to permit this court room to be the medium for talking about things that have nothing to do with the case. I am not going to permit this court room to be the medium for a general discussion of public

policies which are not here the subject-matter of consideration. This defendant is charged with a specific offense; he is entitled to a full and fair trial, and this Court will try that offense and will try nothing else.

Now, in order that this defendant may not be prejudiced, I will instruct the jury—I hardly think the instruction is necessary—that anything that you have said or I have said in this little discussion is not in any manner to prejudice your client.

Now, state your point of law.

Mr. Weinberger: I have stated my points of law.

The Court: Are they all stated?

Mr. Weinberger: All stated.

The Court: Very well. Your motions are denied.

Mr. Weinberger: I respectfully except.

Mr. Content: May I open to the jury?

The Court: Yes.

(Mr. Content opened the case to the jury on behalf of the Government.)

Mr. Content: Let me state that on the 18th day of May, 1917, the President of the United States duly issued his proclomation at the City of Washington announcing that June 5th is the date of registration, and the hours from 7 A. M. to 9 P. M. as the hours of registration, calling upon all male persons who had attained their twenty-first birthday and not yet attained their thirty-first birthday on that date to present themselves for registration, and to submit thereto in the precinct in which they reside.

Will you concede that?

Mr. Weinberger: I do.

HARRY M. KIDDER, a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Kidder, you are a shorthand reporter? A. I am.

Q. You are one of the official stenographers connected with the United States District Court for the Southern District of New York? A. I am.

Q. On the 12th day of June—that is, yesterday—did you take down in shorthand the testimony of Louis Kramer when he appeared as a witness in his own behalf in the case of the United States *vs.* Kramer, Becker, Walker and Sternberg? A. I did.

Q. Do you recall whether or not a question was propounded to Mr. Kramer, on cross-examination by me, with reference to his age; was such a question propounded? A. Yes.

Q. Do you recall the answer made by Kramer to that question? A. I do.

Q. What was his answer? A. Twenty-two years of age.

The Court: That is, he swore he was twenty-two.

Q. Kramer swore to that fact when he was here as a witness in his own behalf? A. Yes.

Q. And at that time, when asked a question by me, he gave his age as twenty-two? A. Yes.

Mr. Weinberger: No cross-examination.

VALENTINE O'TOOLE, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. O'Toole, you are a police office of the City of New York? A. Yes, sir.

Q. What is your grade? A. Detective sergeant.

Q. What is your shield number? A. 505.

Q. On the 31st day of May, 1917, did you see the defendant, Louis Kramer? A. I did.

Q. Where? A. At Madison Square Garden, and in the 57th Street Court, where I assisted in his arrest.

Q. What did you do there? A. I had asked him and taken his pedigree as far as he would give it to me.

Q. Well, did you, among other questions, inquire of him as to his age? A. I did.

Q. On the 31st day of May, 1917? A. Yes, sir.

Q. And did he make reply to the question as to his age? A. He did.

Q. And what reply did he make? A. He was twenty-two years of age.

Q. He gave his age as twenty-two? A. Yes.

Mr. Weinberger: No cross-examination.

BENJAMIN SILVERMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Silverman, you are a member of the Eighth New York Coast Defense Command, United States National Guard? A. Yes, sir.

Q. Were you present in the 57th Street Court, known as the Night Court, on the evening of May 31st, 1917, when Louis Kramer was brought in? A. Yes, sir.

Q. Were you present when the last witness, Detective Sergeant O'Toole, took the pedigree of the defendant, Louis Kramer? A. I was.

Q. Did you hear Sergeant O'Toole propound to Kramer the inquiry as to his age on that date, the 31st day of May, 1917? A. Yes, sir.

Q. Do you recall whether or not Kramer made a reply to the question? A. He did, sir.

Q. Do you recall what reply he made to that question, as to his age? A. I recall he replied his age was twenty-two years.

Mr. Content: That is all.

Mr. Weinberger: No questions.

LOUIS P. KORNDORFER, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Korndorfer, you are a keeper connected with the City Prison of the City of New York? A. I am.

Q. Do you recall the defendant, Louis Kramer? A. I do.

Q. When he was brought into the prison on the 1st day of June, 1917, did you take his pedigree? A. I did.

Q. And did you place the questions that were put to him and replies made thereto on the back of the commitment made by the United States Marshal? A. I did.

Q. Have you any independent recollection of the answers made by Kramer to the questions without referring to the commitment? A. No; I have to refer to the commitment.

Q. Have you the commitment of Louis Kramer there in your hand? A. I have.

Q. Will you look at it and see whether it refreshes your recollection as to whether or not you asked Kramer his age at the time you took his pedigree? A. I know I did.

Q. You know you asked him his age? A. I do; I know that.

Q. Do you recall—look at it and see if it recalls to your mind, or whether it refreshes your recollection as to the answers given by Kramer to the question as to his age on the 1st day of June, 1917? A. He gave his age as twenty-two years.

Q. Twenty-two? A. In my handwriting.

Q. Did you put down in your writing the answer to the question on the back of the commitment which you now hold in your hand? A. Yes, sir.

Q. It was correct at the time you made it? A. I mean you put down correctly the answer that he gave to the question that you propounded? A. I did.

Mr. Weinberger: No cross-examination.

JAMES J. INELLA, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Inella, you are a Deputy United States Marshal for the Southern District of New York? A. Yes, sir.

Q. On the 1st day of June, when Louis Kramer was committed by the Marshal to the City Prison, did you take him to the City Prison? A. Yes, sir.

Q. Were you present when the last witness, Mr. Korndorfer, took the pedigree? A. Yes, sir.

Q. Do you recall of your own recollection whether or not Mr. Korndorfer propounded a question to him as to his age? A. Yes, sir.

Q. Do you recall whether or not Kramer made reply to the question? A. Yes, sir.

Q. He did? A. Yes, sir.

Q. What reply did he make as to the question of his age? A. That he was twenty-two years of age.

Q. Twenty-two years old? A. Yes; and that he lived at 208 Second Avenue.

Mr. Weinberger: No questions.

JOHN J. HANLEY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Mr. Hanley, you are the Warden of the City Prison of the City of New York? A. Yes, sir.

Q. And that is situated in the Borough of Manhattan, at Centre Street? A. Yes, sir.

Q. In the Southern District of New York? A. Yes, sir.

Q. Do you know the defendant, Louis Kramer? A. I do.

Q. On the 5th day of June, 1917, was Kramer brought in to you at the City Prison? A. Yes; he was.

Q. Do you know what date he was committed to the City Prison? A. I think on the 1st; I am not sure; but I think it was; I have the commitment here.

Q. Have you the commitment? A. I have.

Q. Will you consult it and see whether your recollection is correct? A. (After examining paper) On the 1st.

Q. On the 1st he was committed? A. Yes, sir.

Q. Warden, on the 5th day of June, the date fixed by the Commissioner of Correction, did you act as registrar? A. No; beginning on the 2nd.

Q. Were you appointed registrar by the Board of Elections through the Commissioner of Correction of all inmates of the City Prison? A. I was.

Q. Did you make any attempt to have the defendant, Louis Kramer, register as provided by the Act of Congress approved May 18th, 1917? A. I did.

Q. Tell us what you did, Warden Hanley? A. I was ordered by the Commissioner to register every inmate between the ages of twenty-one and thirty-one, and requested that I start in on the 2nd of

June, the 2nd of the month, in order to get our returns in by the 5th—that is, by 5 o'clock on the 5th. I worked through all the other parts of the institution, and I arrived on Mr. Kramer's part; I was there on the afternoon of the 2nd; there being four of them there, I did not want to bring the four together; I divided them up so they would not have—create any disturbance there. When I came to Kramer he absolutely refused, after I explained the object of it; he said he was thoroughly familiar with the President's proclamation, etc. Well, it not being the 5th, I didn't go back again, I didn't go any further with him. Then, on the 5th, after I closed up the institution, I brought him down to my office with the same man I had working with me.

Q. Just state for the record who was present at the time you interviewed Kramer? A. There was Mr. Donohue, the keeper.

Q. He is the keeper? A. Yes; and Mr. Starrs; they are both here.

Q. He is a clerk? A. He is a clerk; Mr. Bremmer, the Deputy Warden, and Mr. Delavan, the head keeper. I didn't bring him down. I didn't know you wanted him.

By the Court.

Q. Kramer spoke English perfectly, did he? A. Perfectly.

Q. And, therefore, of course, understood it? A. He did.

Q. He said to you he was familiar with the President's proclamation? A. He was; and read it.

By Mr. Content.

Q. You did what, Warden, at that time? A. I read the causes for exemption on this circular that I have. He absolutely refused; he said he would not register, provided—if it interfered with the rules of the prison he would register. I told him it did not

interfere with the rules, it was a duty imposed on me by the Commissioner to register everybody there, according to the President's proclamation. He said if it did not interfere with the rules of the prison he would refuse to register.

Q. He refused to register? A. He did.

Q. Well, then, you say he refused to submit to registration? A. Yes, sir; I say that was so on the afternoon of the 5th, and I had him brought down to the office.

Q. On the 5th? A. On the 5th again.

Q. On the 5th day of June, 1917, you brought him down again? A. Brought him down again.

Q. So that there would be no question? A. So there would be no question, I brought him down to the office.

Q. What happened on that occasion? A. I spoke to him along the line of his refusal and told him I thought he was foolish. I told him that I had children as old as he and older, and I talked to him along that line, and he told me then that he would not register.

Q. He would? A. He would not register, he would take the consequences.

Q. On the 5th he repeated his refusal to register, and he said he was willing to take the consequences? A. Yes, sir.

Q. Did you explain to him carefully the purpose for which he was being sent? A. I did.

Q. Now, did you register other persons, inmates of the City Prison? A. I did.

Q. How many did you register altogether? A. 242, outside of him.

Q. Other than Kramer? A. Other than Kramer.

Q. 242? A. Yes.

Q. No other refused to register? A. No, sir.

Q. On the 5th day of June, 1917, was the defendant, Kramer, in the City Prison at all times? A. He was.

Q. From 7 o'clock A. M. to 9 o'clock P. M.? A. Well, that I am not positive of; I am not positive whether he was there all day or not, but he was there when I sent for him.

The Court: Well, he was there at all times——

Mr. Weinberger: It is conceded he was there all day. We do not question any of these things. No cross-examination. We admit all this, and I think we might save the time of the Court; it is not necessary to call any corroboration in the way of these men mentioned, Mr. Donohue and Mr. Starrs, for it is conceded that they will testify to the same effect as Hanley did.

The Court: Then you concede that the defendant refused to register?

Mr. Weinberger: I concede that their testimony is correct.

The Court: Very good.

Mr. Content: The Government rests.

Mr. Weinberger: I move to dismiss on the ground that, taking the story of the People's case, there is no proof that the defendant refused to register; it is not his residence, nor within the district of his residence, and on the ground that he was not taken to that place.

The Court: Motion denied.

Mr. Weinberger: I respectfully except.

The Court: Do you rest?

Mr. Weinberger: No, no.

(Mr. Weinberger opened the case to the jury on behalf of the defendant.)

LOUIS KRAMER, the defendant, called as a witness in his own behalf, being first duly affirmed, testified as follows:

Direct examination by Mr. Weinberger.

Q. Mr. Kramer, how old are you? A. Twenty-two.

Q. Where were you born? A. Russia.

Q. Where do you live? A. 208 Second Avenue.

Q. That is where you have lived for how long? A. Why, before my arrest it would have made three weeks, but my permanent address was at 132 St. Mark's Place, with Dr. Glassberg.

Q. You heard the testimony of the Warden that you refused to register; that is correct? A. It is.

Q. Why did you refuse to register, very shortly and briefly and to the point? A. Registration is the first step to conscription. I, as an anarchist, cannot participate in any uniformed murder, or of wholesale murder. All wars that are waged by governments, or anywhere, is wholesale murder to me.

By the Court.

Q. You refused to register, did you? A. I want to give my reason for——

Q. Answer my question. You refused to register?

Mr. Weinberger: He did answer that question.

The Court: I am interrogating the witness.

Q. You did refuse to register? A. You mean I; yes, sir.

Q. You knew what you were doing? A. I knew what I was doing?

Q. Yes. A. Yes; I was opposed to murder.

Q. You knew that you deliberately refused to register? A. Because I was opposed to murder.

Q. I say you deliberately refused? A. I did.

By Mr. Weinberger.

Q. In stating that you believed in anarchy, did you believe in overthrowing governments by physical force; yes or no? A. I do not.

Cross-examination by Mr. Content.

Q. Mr. Kramer, are you a citizen of the United States? A. I am not, but I am a citizen of the world.

Q. You have never been naturalized, then, in the United States? A. I believe I have answered you, that I am a citizen of the world.

Q. Will you answer my question: Have you ever been naturalized in the United States? A. How can I when I am a citizen of the world.

Q. That is an answer. When did you come to the United States? A. 1894.

Q. What month? A. In December.

Q. And on what ship? A. I do not know.

Q. Are you sure you do not know? A. I am positively sure.

Q. At what port did you embark for the United States? A. I do not know.

Q. How old were you at the time? A. A year old.

Q. With whom did you come? A. Who did I come with? I am not aware of the fact.

Q. You mean to say that you don't know who brought you to the United States? A. I do, and if your Honor will allow me, I had begun to go into the matter of——

Q. Whom did you come to the United States with? A. I don't know.

Q. And do you know whether it was your parents that accompanied you? A. I don't know; how could I know anything about it when I was only one year old? I only know my nativity.

Q. Have you ever heard since who brought you to the United States? A. I have not, because I never

concerned myself with it; there are more vital problems in my path than that.

Q. Have you ever been convicted of a crime? A. Yes, sir—birth control.

Q. What else? A. That is the only one.

Q. Were not you convicted here of the crime of conspiracy in this court?

Mr. Weinberger: He forgot that; it is so recent. It was not fair.

A. Conspiracy? Oh, well, if you want to take into consideration the affairs here lately; yes; I was convicted yesterday of a crime, but I don't consider it a crime.

Q. Well, you were convicted here on the charge of conspiring with Becker—Morris Becker—to violate the provisions of the Selective Draft Law, Section 5? A. I was convicted of a specific——

By the Court.

Q. You were convicted, you say, yesterday of a charge in an indictment, were you not? A. Why, your Honor, not believing in the Government, or the laws that go with it, how can I say it is a crime?

Q. I see. So that you think it was not a crime; that is what you want to convey to the jury? A. What am I guilty of?

By Mr. Content.

Q. Why, you were convicted by a jury last night. A. I was convicted by a jury; yes.

Q. Are you opposed to the Government of the United States? A. I am opposed to all government.

Q. Does that include the Government of the United States? A. It includes all governments.

Q. Does that include the Government of the United States? A. I have answered your question, Mr. Content.

The Court: You can answer that yes or no.

Redirect examination by Mr. Weinberger.

Q. You say you are opposed to all governments; you do not pick out the United States Government, as being opposed to it? A. I do not.

By the Court.

Q. You simply include the United States? A. It does include all governments.

By Mr. Weinberger.

Q. Including the United States, and you have nothing against the United States Government itself? A. No; not in itself.

Q. Merely because your philosophy is based on the belief that all human business can go along without any government? A. Yes, sir.

Recross-examination by Mr. Content.

Q. Did you know that the President had issued his proclamation whereupon he called upon all male persons between the conscriptive ages to register on June 5th?

Mr. Weinberger: We admit that.

Mr. Content: I ask him that question.

The Court: It is admitted.

The Witness: It is admitted; yes, sir; I knew that.

Mr. Weinberger: The defendant rests.

Mr. Content: The Government rests.

(Mr. Weinberger summed up to the jury on behalf of the defendant.)

(Mr. Content summed up to the jury on behalf of the Government.)

Charge of the Court.

MAYER, *J.:*

Gentlemen of the Jury: The facts in the case are conceded, and the result is that it is a mere legal formality that I now charge you. Nevertheless, as you have given up your time from your many duties to perform your services as jurors, I think perhaps it is only fair to you that I should explain what this law is, and what the nature of the indictment is under which this defendant has been charged with this crime.

On the 18th day of May, 1917, there became a law by virtue of the signature of the President, an act passed by Congress, providing for the registration of a certain part of our population. This was preliminary to what has become known as the selective draft.

Without going into the details of the Selective Draft Law, it directs the proper officers of the Government and vests them with the duty of determining what men shall serve the Government, and in what capacity. That statute had to do with all persons, whether citizens or aliens here in this country, between certain ages, and when the proper time comes the properly constituted officers of the Government will later determine what men shall be exempted and what men shall serve in the army or the navy, and what men shall serve in industrial pursuits, and what men shall serve in agricultural pursuits.

Therefore, as a necessary precedent step in order that the Government might obtain the information, Section 5 of the act to which I have referred provided this:

"That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President or other public notice given by him or by his directon stating the time and

place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia, while in the service of the United States, to present themselves for and submit to registration under the provisions of this act: and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall wilfully fail or refuse to present himself for registration or to submit thereto as herein provided shall be guilty of a misdemeanor and shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered."

Now, it is conceded by the defendant's own testimony, in addition to the testimony of the Government's witnesses, that the defendant was twenty-two years of age, and that is an age within the provisions of the statute, and he himself has conceded that he wilfully refused to register.

There is, therefore, no question of fact in the case.

Upon the evidence in the case it appears that he has wilfully refused to register, being of the age required to register.

Now, this is a country of law and order, and men must obey the laws duly enacted. When it comes to the question of punishment the law places the responsibility upon the Judge. The Judge may regard or disregard, as his duty and as his conscience dictated, any recommendation by the jury in regard to mercy. Such recommendations are no part of the jury's duty, but there are cases where, owing to some circumstances that impressed the jury, juries have felt called upon to recommend mercy and judges usually accept those recommendations

in the earnest spirit in which a jury of good citizens present such recommendations.

You are here performing an important public duty. Counsel for the defendants has practically conceded that the facts existed which show a violation of the statute.

He has appealed to you that you should recommend to the Court mercy. I don't propose to take that privilege away from you, if you care to exercise it, but it is for you, a body of substantial, earnest citizens, who are giving your time to important public service, to say among yourselves whether you care to make any such recommendation at all.

With these instructions I leave the matter for you.

Mr. Weinberger: May I ask the Court to make this correction: I think the Court is inaccurate in just one particular; counsel for the defendant did not ask the jury to recommend the defendant to the mercy of the Court, but merely to the consideration of the Court in reference to the legal rights of appeal, and to be given every facility, not as a matter of mercy. In other words, I ask the Court to change that part of his charge, not that the defendant asks for mercy, but that the defendant asks that the jury recommend to the Court, to give the defendant every consideration on his way up to the higher Court.

The Court: That is no function of the jury and never was a function of the jury. When a jury renders its verdict the future proceedings are matters with which the jury is not concerned.

It now appears, according to the statement of counsel, that I was in error, and that you are not asked for a recommendation of mercy. Do you desire to retire, gentlemen?

Mr. Weinberger: May I ask one other recommendation? Will your Honor charge the jury that they have the power to recommend the defendant to the consideration of the Court?

Mr. Content: To the mercy of the Court.

Mr. Weinberger: To the consideration of the Court.

The Court: I decline to so charge in the words requested, in view of the statement of counsel that the consideration has to do with matters subsequent to the verdict.

Mr. Weinberger: I respectfully except.

The Court: And that your request does not refer to a recommendation of mercy.

Mr. Weinberger: I ask that your Honor may charge that the jury has a right, in addition, if it finds the defendant guilty, to make any recommendation to the Court it may deem desirable to itself.

The Court: I decline.

Mr. Weinberger: I respectfully except.

(The jury retired.)

(The jury returned and found the defendant, Kramer, guilty as charged.)

The Court: Gentlemen of the jury, the prompt manner in which you decided this case, and the manner in which you have decided it, are both a source of great gratification to the Court.

I want to thank you for wisely and properly performing a public duty.

Mr. Weinberger: I move to set aside the verdict on the ground it is improper, on the ground that the law is unconstitutional, and that the conviction is improper and opposed to the Criminal Code.

The Court: Motions denied.

Mr. Weinberger: I except:

The Sentence of the Court (Mayer, *J.*)

The Court: Under the statute the maximum punishment is one year. In cases where the punishment is over one year it is necessary that the imprisonment shall be in Atlanta, but in cases of one year or less the carrying out of a sentence has to be in the prison in Mercer County Prison, in New Jersey.

The sentence of the Court is that you be imprisoned in the Mercer County Prison for the term of one year; that imprisonment to start at the conclusion of your imprisonment under the previous indictment in the United States Penitentiary at Atlanta.

The foregoing contains all of the testimony given at the trial, and all of the foregoing proceedings were had and exceptions taken and noted by the Court before the jury retired to consider of its verdict, and because the same would otherwise not appear of record the defendant prays the Court to sign this, his bill of exceptions, to have the same force and effect as to each of said exceptions as though the same were set forth in a separate bill of exceptions, which is granted; and, accordingly, the Court signs this defendant's bill of exceptions, to have the force and effect aforesaid, now for then, this 10th day of September, 1917.

JULIUS M. MAYER,
Judge.

Notice of settlement waived September 8th, 1917.

FRANCIS G. CAFFEY,
U. S. Attorney, S. D. of New York.

Assignments of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

Now comes the above-named Louis Kramer, plaintiff-in-error, by his attorney, and makes and files the following assignments of error upon which he will rely upon the prosecution of the writ of error to the Supreme Court of the United States sued out by him herein to review the errors committed in the above-entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against him in the said Court; that the District Court erred as follows:

FIRST: In not dismissing the indictment herein, upon the ground that the same did not charge the defendant with any offense against the United States or in law thereof.

SECOND: In not granting the motion for arrest of judgment, on the ground that the indictment did not charge an offense against the United States or in law thereof.

THIRD: In not setting aside the verdict, upon the ground that the facts proved did not constitute

an offense against the United States or in law thereof.

That the District Court erred in the construction and application of the Constitution of the United States and in the disposition of the merits of the case, as follows:

FOURTH: In denying defendant's motion made at the opening of the trial to dismiss the indictment, upon the ground that the same did not charge the defendant with any offense against the United States or in the law thereof, upon the following grounds:

1. In that the said law, entitled

"An act to authorize the President to increase temporarily the military establishment of the United States,"

approved May 18, 1917, also known as "The Conscription Law," is unconstitutional upon the following grounds:

a. It violates Section 13, Subdv. I of the Amendments to the United States Constitution, which reads as follows:

"Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction."

The said law imposes military, agricultural or industrial service under any conditions determined by the military or Congress as to hours, condition and pay on all male persons in the United States between the ages of twenty-one and thirty, both inclusive, excepting officers and enlisted men of the regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States, and officers in the Of-

ficers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service.

b. It violates Article I of the Amendments of the United States Constitution, which reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

That this "Conscription Law" does establish a religion, in that it gives a special privilege to members of "any well recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations," and it prohibits and invades the free exercise of the religion of any and all individuals not belonging to "any well recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation in accordance with the creed or principles of said religious organizations."

c. It violates Article I of the United States Constitution, Section 8, Subdv. 15 and 16, which provides:

> "That Congress shall have power" (Subdv. 15) "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." (Subdv. 16) "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and

> the authority of training the militia according to the discipline prescribed by Congress."

That neither an invasion nor a rebellion is taking place, and, further, that the law does not call the Militia, but calls upon all male persons with certain exceptions between the ages of twenty-one and thirty years, inclusive.

d. It violates Article I, Section 8, Subdv. 12 of the Constitution, which reads as follows:

> "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

e. It violates Article IV, Section II, Subdv. 1 of the Constitution, which reads as follows:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

That the said law imposes military, agricultural or industrial service on all male citizens between the ages of twenty-one and thirty years, inclusive, with certain exceptions, thereby excluding the excepted classes and older and younger males.

f. It violates Article V of the Amendments to the Constitution, which reads as follows:

> "No person shall * * * be deprived of life, liberty or property without due process of law."

FIFTH: In denying the defendant's motion to dismiss the indictment herein or to instruct the jury to acquit the defendant made at the conclusion of the case, as presented by the United States, upon the grounds contained in the first assignment of error, and upon the further ground that the indict-

ment does not charge a crime; that upon all the facts proven the defendant is not guilty, the said act requiring registration being unconstitutional.

SIXTH: In denying the defendant's motion to set aside the verdict of the jury rendered against him, which motion presented to the Trial Court was as follows: That the verdict was contrary to the evidence, contrary to the law.

SEVENTH: In denying the defendant's motion for arrest of judgment upon all the grounds hereinbefore set forth.

WHEREFORE, the said Louis Kramer, plaintiff-in-error, prays that the said judgment herein for errors aforesaid may be reversed and altogether held for nothing, and that his said trial should go for naught, and that the said plaintiff-in-error may be restored to all things which he has lost by reason of said judgment, and for such other and further relief as to the Court may seem proper.

Dated, July 17, 1917.

HARRY WEINBERGER,
Attorney for Louis Kramer,
Plaintiff-in-Error,
Office & Post Office Address,
261 Broadway,
Borough of Manhattan,
City of New York

Petition for Writ of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

LOUIS KRAMER,
Defendant.

Now comes the above defendant, Louis Kramer, by his attorney, and complains that on the 13th day of June, 1917, the District Court of the United States for the Southern District of New York gave judgment in the above-entitled cause against the defendant, in which judgment in this cause certain errors were committed to the prejudice of this defendant:

FIRST: In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause, all of which will appear more in detail from the Assignment of Errors, which is filed with this petition.

WHEREFORE, the said defendant, Louis Kramer, prays for the allowance of a writ of error and for such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected the said Justices of the said Supreme Court of the United States cause further to

be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said Writ of Error by the said Supreme Court of the United States.

And your petitioner will ever pray, etc.

Dated, this 17th day of July, 1917.

HARRY WEINBERGER,
Attorney for Defendant,
Louis Kramer,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
City of New York.

Supersedeas.

Writ of Error, to operate as a Supersedeas, allowed, returnable, according to law, the defendant to furnish bail in the sum of Two Thousand (2000) Dollars, conditioned according to law, subject to the approval of one of the Judges of the United States District Court for the Southern District of New York.

Dated, July 19th, 1917.

LOUIS D. BRANDEIS,
Associate Justice of the United States Supreme Court for the Second Circuit.

Citation.

UNITED STATES OF AMERICA, SS.:

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York wherein Louis Kramer is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Southern District of New York:

Writ of Error and order allowing same, dated July 19th, 1917.

Indictment, filed June 6th, 1917.

Bill of Exceptions, dated September 10th, 1917.

Assignment of Error, dated July 17th, 1917.

Petition for Writ of Error and supersedeas endorsed thereon, dated July 19th, 1917.

Citation, dated July 19th, 1917.

Stipulation Settling Record.

Certificate, dated September 12, 1917.

Dated, New York, September 11, 1917.

HARRY WEINBERGER,
Attorney for Plaintiff-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-in-Error.

Stipulation Settling Record.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, September 11th, 1917.

HARRY WEINBERGER,
Attorney for Plaintiff-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-in-Error.

Clerk's Certificate.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LOUIS KRAMER,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, in the City of New York, in the Southern District of New York, this 17th day of September, in the year one thousand nine hundred and seventeen.

(Seal)

ALEXANDER GILCHRIST, JR.,
Clerk.

FILE COPY

Office Supreme Court, U.S.
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

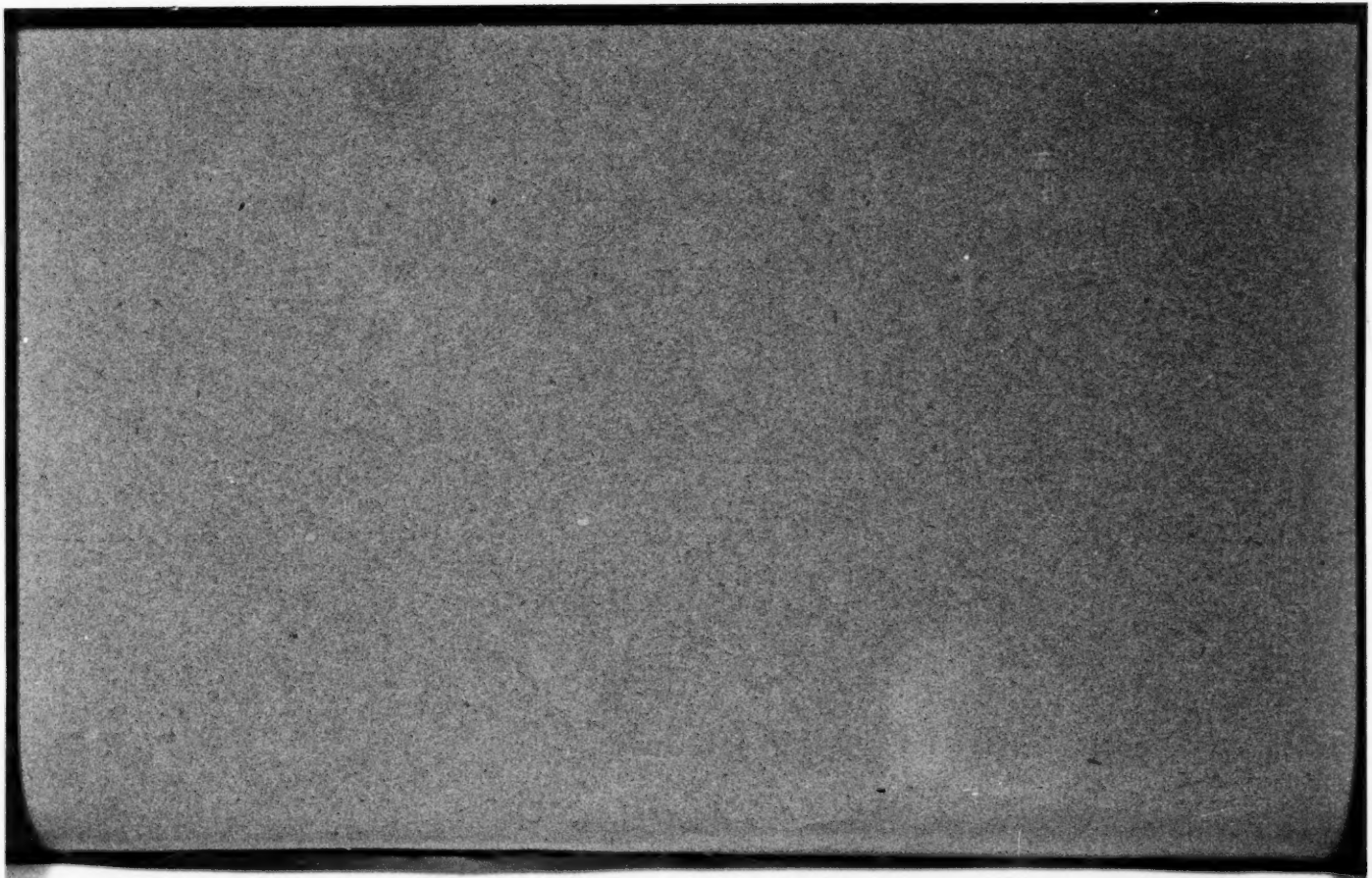
LOUIS KRAMER and MORRIS BECKER,
Plaintiffs-in-Error,
against
THE UNITED STATES.
No. 660.

LOUIS KRAMER,
Plaintiff-in-Error,
against
THE UNITED STATES.
No. 661.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
No. 261 Broadway,
Borough of Manhattan,
City of New York.

HARRY WEINBERGER,
of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

LOUIS KRAMER and MORRIS BECKER, Plaintiffs-in-Error, against THE UNITED STATES.	No. 680.
LOUIS KRAMER, Plaintiff-in-Error, against THE UNITED STATES.	No. 681.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

Statement.

The indictment charges the defendants Louis Kramer and Morris Becker, with Joseph Walker and Louis Sternberg, with conspiracy as accessories before the fact for violation of the Draft Act by

aiding, abetting, etc., male persons subject to registration to unlawfully and wilfully fail and refuse to register, in violation of Sections 37 and 332, U. S. C. C., and Section 5 of the Act of May, 1917 (see Indictment, pp. 2 to 7).

The plaintiff Louis Kramer, being subject to the Draft Act, is indicted for having failed and refused to register on June 5th, 1917, while in the Tombs prison awaiting trial on the charge of conspiracy mentioned above.

Plaintiff claims that the Act known as the Draft Act is unconstitutional, and therefore that there was no necessity of registering in compliance with it, and that therefore the indictment does not state a crime, and the fact of refusing to register does not prove a crime.

Assignments of Error.

These will be found *in extenso,* pages 268 to 272 inclusive of the transcript of record in the conspiracy case, and on pages 32 to 36 in the registration case.

POINT I.

No crime of conspiracy charged in the indictment.

See Point I, Goldman and Berkman against The United States, No. 702.

POINT II.

No evidence of defendants' guilt.

The following is a concise statement of all the facts as shown in the evidence:

Defendant Louis Kramer is alleged to have given out pamphlets to unknown persons entitled, "No Conscription," and did request an unknown person wilfully to fail and refuse to present himself for registration, and did also give a pamphlet and requested one James J. Finan (who is a detective and not of draft age—see p. 13), to fail and refuse to present himself for registration on June 5th.

Defendant Morris Becker is alleged to have had in his possession and distributed two different kinds of pamphlets entitled "No Conscription" to several unknown persons.

Defendant Joseph Walker, it is alleged, gave to divers persons unknown two different pamphlets entitled "No Conscription."

Defendant Louis Sternberg is alleged to have had in his possession two different kinds of pamphlets entitled "No Conscription."

The facts as testified to are, briefly, these:

Detective James J. Finan for the Government was at the mass meeting at Madison Square Garden on the 31st day of May, 1917, and saw the four defendants there (p. 13). He saw Kramer and Becker talking together about 10.30 P. M. Kramer had wide circulars on his arm and Becker had small ones. They gave them out to different people to distribute, among whom were Walker and Sternberg, on the next to the top balcony of Madison Square Garden (p. 15). Kramer then started to distribute his circulars and gave one to Finan, and that he said to Finan in answer to a question, "If

you will take our advice, you will stay away from the polls or the registration places. If everybody stays away there is not soldiers or police enough to make us go, but if some people go we will all have to go. If you stay away we will be right back of you" (p. 16). Finan did not arrest Kramer when he said this. But Kramer kept on giving out these pamphlets and gave some to Sergeant Silverman of the 8th Coast Artillery, who was in uniform, who arrested him, and after that Finan took him in custody (p. 18). Then another soldier came over with Walker under arrest (p. 20), who had also a bundle of pamphlets.

The two prisoners were taken downstairs and the soldiers went to look for others who were giving out the pamphlets, on the advice of Finan, who did not think of arresting Kramer in the first place, even when Kramer told him not to register, but as soon as the soldiers arrested Kramer for giving out the pamphlets, Finan said arrest them all.

Four or five minutes later they brought down Sternberg. Sternberg when brought down said to Walker, so Finan testified: "How much of the stuff did they find in your possession?" Walker said: "Why, they found all I had," and then he (Sternberg) said, "They found all I had." Then Walker said to Sternberg, "How much did they get on you?" or "What did they get on you?" and Sternberg said, "All they got on me was some of the pamphlets." (Perfect English slang. This slang will be important as the evidence is developed, for Sternberg, as it is finally proved, could not talk English at all.) The three prisoners were taken to the police court. Defendant Becker was brought in to the police court ten or fifteen minutes after the others. That Louis Sternberg at the police court said he was twenty-four years of age, born

in Russia, single, was a hatter and lived at 94 Rutgers Street (p. 24). He stated that Sternberg walked around the balcony with a bundle of pamphlets (p. 25).

Benjamin Silverman, attached to the 8th Coast Defense Command, U. S. National Guard, testified that he saw Kramer giving out circulars, large and small (p. 34), and that he told someone not to register in quite a long speech (p. 35), and that he sent Private Henry to arrest Walker, who was giving out circulars.

Silverman then stated that he heard Sternberg in broken English say, "How much of the stuff did they get on you?" etc., and that a little while later he heard Sternberg say to Walker, "Did they overhear the conversation of you instructing others not to register on Tuesday?" He (Walker) said, "There was detectives all over the house, they must have overheard us" (p. 39).

It will be noted that the alleged conversation was in English, and apparently if this and the other testimony of the Government's witnesses was true, there is no doubt that Sternberg and Walker were part and parcel of an agreement to tell people not to register. This is very important because of what happened at the end of the trial—Sternberg was acquitted by the Court, and Walker by the jury.

Silverman did not get the name of anyone that Kramer spoke to, or to whom he said "Don't register" (p. 47).

Other Government witnesses confirmed Finan's and Silverman's testimony as to Kramer and Walker, and some as to Sternberg's conversation in English or broken English.

James Henry arrested Becker for giving out the circulars, and that Becker said to him that he did not know what he was giving out (p. 54).

Lawrence Bevins, an enlisted man in the U. S. Navy, testified he saw pamphlets coming down from a balcony, but he could not see who did the dropping (p. 61), and that he saw pamphlets in the pocket of Sternberg, who was sitting in the balcony, and arrested him (p. 62).

After other witnesses testified in confirmation, the Government rested.

A motion was made to dismiss on behalf of the four defendants on the ground that no conspiracy had been proven; that the only testimony was that four men were giving out circulars, which is not a violation of law, and no proof of conspiracy, and that one of them stated "Don't register." The same motion was made as to the four individually. All motions denied and exception taken (pp. 86 and 87).

The defendants all testified. Becker that he gave out circulars advertising the meeting to be held at Hunt's Point Palace. He did not tell anyone not to register (beginning p. 87). He admitted that he was a member of the No-Conscription League, which was opposed to conscription (p. 90). That he was an anarchist and opposed to all government and all war, believing that government and wars are not necessary (pp. 97 to 97). He did not give out circulars, having had to check them (p. 109).

Joseph Walker, one of the defendants, was not a member of the No-Conscription League nor an anarchist (p. 113). He testified he did not give out any pamphlets; that he did not know Sternberg before the meetnig, and did not tell anyone not to register (p. 115), and that Sternberg did not talk to him in English or broken English at the time of his arrest (p. 116).

The Court would not allow the examination of the Assistant District Attorney to show that all

the witnesses who had testified against defendants, one evening while the trial was going on, had assaulted citizens and forced them to show registration cards, contrary to law and the Constitution, so as to affect their testimony, inasmuch as it would show if they did not respect the law and the Constitution, they would not hesitate in stretching their testimony. Nor would the Court allow legal argument to show its relevancy (pp. 125 to 130).

Louis Sternberg testified that he cannot talk English at all (p. 131). That he is not an anarchist and is not opposed to conscription, and that he registered. That he did not know the other defendants and that he got pamphlets in the gallery (p. 132). The alleged slang English never took place (p. 135). Sternberg testified where and who he worked for and for how long (p. 139). Witness after witness that have known him since he came to this country testified that Sternberg could not talk English (pp. 146, 152, 156, 157, 158, 160, 161, 163, 164, 165, 166). Other witnesses for the Government testified that he did talk some English, and some that he did not, but Sternberg was acquitted by order of the Court (p. 241).

So that the stretching of the evidence, the palpable frame-up is strongly apparent as far as the detectives and soldiers are concerned, in reference to Sternberg, even in the opinion of the Court, which directed his discharge.

Louis Kramer admitted that he was an anarchist and opposed to militarism, and that he had not registered and would refuse to (p. 177). That he gave out circulars, but that he did not tell anyone not to register, and had no agreement nor did he conspire with defendants or anyone else to tell people not to register.

The jury acquitted Walker, so that the evidence against him is branded as a frame-up by the jury. But the jury on the same evidence which connected together the four defendants did convict Becker and Kramer, the two anarchists, of conspiracy as accessory before the fact.

The examination of the proceedings in court, the expressed attitude of the Court, and the Court's examination of witnesses, and the continual helping out of the Assistant District Attorney, explains why the jury were swayed into convicting Kramer and Becker.

The Court would not adjourn the case at the close of the evidence for counsel's summing up or motions on the law, despite counsel's statement that he was "absolutely, physically tired" and his explanation why he was tired (p. 238), and that counsel had not had time to prepare the law or the summing up. The hour at the time was 3.30 P. M. The Court absolutely refused and said "that cases involving the so-called Registration Law" shall have preference, and the Court would not adjourn for the day. Counsel then stated, "I don't believe the rights of defendants should be prejudiced by the exhausted condition of the defendant's counsel or the excess speed, because there is no necessity of speed." "The Court: Your motion is denied. Have you any motions?" (p. 239). "Mr. Weinberger: May I respectfully have an exception on the ground of physical inability to proceed and the Court forcing me to finish the case to-night?" (p. 240; see also p. 241). The Court's attitude explains the verdict of conviction of two of the defendants despite the lack of evidence, more than pages of argument.

The jury while acquitting Walker and convicting Becker and Kramer, did so "with recommendation

to your Honor's clemency." The Court's *clemency* was the limit of the law for Kramer, "Two years and $10,000 fine" in the United States Penitentiary at Atlanta; Becker to one year and eight months. This again is a mirror up to the Court's attitude.

The law applicable to this point is the Point II, *Goldman and Berkman* v. *United States*, No. 702.

POINT III.

The Draft Law is unconstitutional.

The law applicable to both cases is same as Point III, *Goldman and Berkman* v. *The United States*, No. 702.

POINT IV.

If Draft Law unconstitutional, there can be no conspiracy to violate it.

The law applicable same as Point IV, *Goldman and Berkman* v. *The United States*, No. 702.

CONCLUSION.

It is respectfully submitted that the decision of the court below should be reversed in both cases, and the Draft Act declared unconstitutional.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
No. 261 Broadway,
Borough of Manhattan,
City of New York.

HARRY WEINBERGER,
of Counsel.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1917.

No. .

EMMA GOLDMAN AND ALEXANDER BERKMAN,
PLAINTIFFS-IN-ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Writ of Error and Order Allowing Same.

UNITED STATES OF AMERICA, ss.:

The President of the United States, To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Alexander Berkman and Emma Goldman, Defendants, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
(Seal) Clerk of the Supreme Court
of the United States

Allowed by

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Indictment.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City and County of New York, within and for the District aforesaid, on the first Tuesday of June in the year of our Lord one thousand nine hundred and seventeen, and continued by adjournment to and including the 21st day of June in the year of our Lord one thousand nine hundred and seventeen.

SOUTHERN DISTRICT OF NEW YORK, ss.:

THE GRAND JURORS OF THE UNITED STATES OF AMERICA, within and for the District aforesaid, on their oath present that on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, the President of the United States of America duly issued his Proclamation as provided by the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," in which said Proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several States and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7 A. M. and 9

P. M. on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular army, the navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service:

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Emma Goldman and Alexander Berkman (hereinafter referred to as the defendants), both late of the City and County of New York, in the District aforesaid, heretofore, to wit, on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, and on each and every day thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, that is to say: The said defendants unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with the said divers persons whose names are to the Grand Jurors unknown, that divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and

place of such registration, being under the duty as persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress, approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," should unlawfully and wilfully fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress, approved May 18, 1917;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that the said defendants, Emma Goldman and Alexander Berkman, unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with the said divers persons whose names are to the Grand Jurors unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress approved May 18, 1917, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," unlawfully

and wilfully to fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress approved May 18, 1917;

And to effect the object of the said conspiracy, the defendant Emma Goldman, on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words, "We don't believe in conscription!" and ending with the words "we can support the point of real freedom and liberty and brotherhood," at a public meeting held in the Harlem River Park and Casino, situate at Second Avenue, 126th to 127th Streets, in the City and County of New York, in the Southern District of New York;

And further to effect the object of the said conspiracy, the defendant Alexander Berkman, on the first day of June in the year of our Lord one thousand nine hundred and seventeen, did publish and cause to be published, in the City and County of New York, in the Southern District of New York, a periodical and publication entitled "*The Blast,* Vol. II. New York, June 1, 1917. No. 5";

And further to effect the object of the said conspiracy, the defendant Emma Goldman, on the second day of June in the year of our Lord one thousand nine hundred and seventeen, did give to one James A. Hagerty, at the office of the No-Conscription League, situate at 20 East 125th St., in the City and County of New York, in the Southern District of New York, a copy of a periodical and publication entitled "*Mother Earth,* Vol. XII. June, 1917. No. 4";

And further to effect the object of the said conspiracy, the defendant Alexander Berkman, on the fourth day of June in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words "Comrades, friends and enemies," and ending with the words

"You know that after all, the cause of the soldiers and the workers is the common cause," at a public meeting held at the Hunts Point Palace, situate at 953 Southern Boulevard, in the City of New York and County of Bronx, in the Southern District of New York;

And further to effect the object of the said conspiracy, the defendant Emma Goldman, on the fourth day of June in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words "Men, don't you know that the soldiers came here to disturb the meeting?" and ending with the words "and you will all raise one mighty voice just going to drown militarism," at a public meeting held at the Hunts Point Palace, situate at 953 Southern Boulevard, in the City of New York and County of Bronx, in the Southern District of New York;

Against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (§§37 and 332 U. S. C. C., and §5 of the Act of May 18, 1917.)

FRANCIS G. CAFFEY,
United States Attorney.

(Endorsed:) U. S. District Court, United States of America vs. Emma Goldman and Alexander Berkman. Indictment—Conspiracy to induce persons not to register, Secs. 37 and 332 U. S. C. C., and Sec. 5 of the Act of May 18, 1917, Francis G. Caffey, U. S. Attorney. A true bill, Geo. N. Taylor, Foreman. June 21, 1917, Defendants plead not guilty. Bail fixed in sum of $25000 each. Wed. next for trial. June 27 to July 9, 1917, Trial. July 9, Trial concluded. Verdict, Defendants guilty as charged. July 9, Emma Goldman sentenced two years and Ten thousand dollars fine and to stand committed, etc., Mo. State Pen., Jefferson City, Mo. July 9, Alexander Berkman sentenced two years and fine Ten thousand dollars

and to stand committed, etc., U. S. Pen., Atlanta, Ga., J. M. MAYER, *J.*

Defendants' Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

vs.

EMMA GOLDMAN and ALEXANDER BERKMAN.

This cause came on for trial on June 27th, 1917, before Hon. JULIUS M. MAYER, *J.*, and a jury. Appearances: Francis G. Caffey, Esq., United States Attorney, for the Government; Harold A. Content, Esq., Assistant U. S. Attorney, of counsel. Emma Goldman, one of the defendants, in person. Alexander Berkman, one of the defendants, in person. Thereupon the following proceedings were had:

Mr. Content: Where is Mr. Weinberger?

Mr. Berkman: We will defend ourselves. I move an adjournment on the following grounds: We have had absolutely no chance of familiarizing ourselves with the case, or with the charges against us brought by the prosecution. We have been unable to see witnesses or subpoena witnesses, many of them being out of town. We have been out on bail only a very short time, owing to the fact that it was impossible to secure $25,000 bail for the defendant Emma Goldman; owing further to the fact that the prosecution placed many obstacles in the way of the defendant Alexander Berkman. The defendant Emma Goldman has been out only since Thursday evening late. Every moment of the time

until Monday night was devoted to securing bail for the defendant Alexander Berkman. As a result of this we have been utterly unable to even talk or give a thorough reading to the indictment, to familiarize ourselves with the indictment, and familiarize ourselves with the different phases of the law employed in the indictment. For these reasons we ask for a reasonable adjournment to prepare ourselves for our defense.

Mr. Content: Your Honor will understand that whereas it is always the defendant's right to defend himself or herself, on the other hand up until this moment, Mr. Weinberger was the attorney of record. I asked his clerk a few minutes ago where he was and he said he would be here in a few moments. This is a form of indictment Mr. Weinberger ought to know and knows. He was furnished with a copy of the indictment the day it was filed. He has had ample opportunity to look it over, and it is not any very different form from other indictments in which he has been counsel.

Miss Goldman: May I say something, your Honor?

The Court: Yes.

Miss Goldman: I wish to state it is not true, as stated by Mr. Content, that Mr. Weinberger had the charge of our case. He is not in charge of our case, not because he would not have been willing or glad to appear, but because we decided after due consideration to conduct our own case. Mr. Weinberger, it is true, the clerk said, will appear in court. He may indeed appear in court, but not as the counsel for our defense. We wish to conduct our own case, and we feel we ought to have a reasonable adjournment to prepare our case, both in view of the fact that we do not know the intricacies of the law, and we ought to have time to give it due consideration from every angle. So we are asking your Honor to extend us a reasonable adjournment.

Mr. Berkman: I should like to add to the reasons given by Miss Goldman that I have been out only since Monday, five o'clock in the afternoon. To-day is Wednesday morning. It was absolutely a physical impossibility for me to do anything to become familiar with the indictment, look up witnesses, to give the matter much thought, especially in view of the fact that I was twelve days in jail, and that I was in great pain, had an accident to my foot, had no treatment in the cell, and that I am physically and mentally just now not in a condition to go ahead with the trial because of my accident.

The Court: When this case first came up, I stated that the case would proceed to-day. At that time Mr. Weinberger represented both of the defendants, and apparently has represented them, so far as any information came to the prosecuting attorney, until this very moment. The statute of May 18, 1917, provides that violations thereof shall have precedence on the criminal docket. That is the mandate of Congress, approved by the President of the United States.

Now, while, technically speaking, this indictment of the two defendants here now is not for the violation of that act, the indictment is for a conspiracy to violate that act, and is well within the spirit and the purpose which Congress laid upon the courts of trying violations of that act, or anything which violated the authority directly, without delay, for reasons that Congress regarded as appropriate reasons of public policy.

Now you have concluded to conduct your own case, which is your absolute right; and every effort will be made to give you the fullest opportunity to conduct your own case in accordance with law; but I deem it my duty to deny the motion, and the case will proceed.

Mr. Berkman: May I say something with regard to that act? I am not familiar with it; but I take

it for granted that that act does not intend to deprive us of the opportunity to prepare our case.

The Court: I have ruled, Mr. Berkman. The stenographer will note an exception on behalf of each, which will preserve your rights.

Miss Goldman: May I also say, your Honor, that I take it that it is not the intention of the Court to prosecute us—that as long as we do not, we are not familiar with the details of the indictment, as long as we are not, have not been in a position to even familiarize ourselves with the different phases of law employed in the indictment, have we not the right to ask you to reconsider your denial of the motion, and grant us a reasonable adjournment for the sole purpose of familiarizing ourselves, of studying the phases, and of making an adequate defense? Surely, your Honor, that is a thing which is even granted and was granted in a country like Russia under the Czar. Surely we ought to have the right in the United States.

Mr. Content: Will you permit me to make this suggestion on the record: The defendant Miss Goldman states that Mr. Weinberger was not unwilling to represent them, and that until to-day he did represent them, therefore they have not been deprived of the right of counsel in any regard.

The Court: You have had the fullest opportunity. The proceedings began by the arrest and subsequent arraignment before the Commissioner. You were then arraigned before this Court. You were informed of the nature of the charge against you. You were represented then by counsel. You have had the fullest opportunity, and I can do no more than reiterate my conclusion to deny the motion; and the stenographer is instructed to note that you except to my decision, so that your rights may be preserved.

Miss Goldman: We take exception.

Mr. Berkman: We take an exception. May I call your attention also to the fact that Mr. Wein-

berger never represented me as an attorney in the sense of defending me, because he only represented me as an attorney to help get my bail, and having not been in the jail sufficiently there would be no opportunity to prepare my case.

The Court: I have ruled, Mr. Berkman.

Mr. Berkman: May I put in as evidence, or ask your Honor's attention to a letter from a physician who has been treating me with regard to my injury?

The Court: Yes. The stenographer will note that this letter from Dr. Max Strunsky, 226 West 70th Street, has been presented by the defendant Berkman, and will spread the same on the record. (The letter reads as follows:) "I hereby certify that Alexander Berkman has sustained a severe injury to his leg and it is necessary for him to have proper medical treatment, and he is suffering great pain at the present time because of his said injury. Dr. Max Strunsky."

Miss Goldman: If I may say, since we were denied a reasonable adjournment and since we are not prepared for trial, we refuse to participate in the proceedings.

The Court: Very good. You may be seated, each of you.

Mr. Content: Shall the Clerk call the jury?

The Court: In order to protect the rights of the defendants, let the Clerk note a motion upon their behalf to dismiss the indictments against them. This motion, for their protection, will be understood to be addressed to such constitutional questions, if any, as they may desire to refer at any time; and also addressed to the indictment from the standpoint of whether or not it sets forth a crime.

The Court denies the motion to dismiss, and the record will show an exception reserved to the defendants, to preserve their rights. The Clerk will now call the jury.

(The Clerk then called twelve talesmen and filled the jury box.)

Mr. Content: Do you want to examine the jurors?

Miss Goldman: I don't wish to participate in this farce.

Mr. Content: Then you don't want to examine any jurors?

Miss Goldman: No, I don't.

Mr. Content: Mr. Berkman, do you desire to examine any of the jurors in this proceeding?

Mr. Berkman: I should like to find out first how we are going to be tried, since we are not prepared. I have stated that I got out of jail Monday, five o'clock at night. I only had one day and it was absolutely humanly impossible to get ready. I have not read the indictment yet and I have been in great pain, as the statement of the doctor will testify.

Mr. Content: Your Honor has passed on that.

The Court: I have answered all that. I have ruled that you have had plenty of time.

Mr. Berkman: But I have not had.

The Court: And I have so ruled and you have an exception, and you say you will conduct your case, each of you.

Mr. Berkman: When I get a chance to prepare.

The Court: Very well. Now you are at liberty to examine the jury, each of the defendants. That is the first procedure. You may ask the jury any appropriate questions.

Mr. Berkman: But you have deprived me of the opportunity to prepare myself.

The Court: Now, Mr. Berkman, let me say to you, I will and I desire to protect your rights, but I will not allow any speeches in the court room. I will do everything I can, not observing too closely legal technique, to let you present any matters you desire to present, that have to do with the law or the facts in this case; and I now state to both of the defendants that you can examine the jury. Now

you may examine the jury if you desire to do so.

Miss Goldman: May I not ask, or may we not ask to be instructed what the procedure of the prosecution——

Mr. Content: May I assist Miss Goldman?

The Court: Yes.

Miss Goldman: Just a moment—may we not be instructed, that in case we refuse to participate in the trial, which is really a farce and not a trial, may we not be instructed as to our rights, at least as to the procedure of the prosecution, as far as we are concerned?

Mr. Content: If you will give me a minute, I think I can explain to the defendants. I am the prosecuting officer but there is no reason why the legal procedure should not be explained to them, and what it should be in this case.

(Consultation between Mr. Content and Miss Goldman.)

Miss Goldman: I understand that. I am just as pleased that you should.

The Court: I will state for the benefit of the defendants——

Mr. Content: If your Honor will give me just a minute.

The Court: Very well.

(Further consultation between Mr. Content and defendants.)

Miss Goldman: Your Honor, since we realize that the trial will only be a greater farce if we allow ourselves to be tried——

Mr. Content: I take an exception to Miss Goldman's remarks.

Miss Goldman (continuing): —to be tried without an examination, we will examine the jurors under protest. We want it to go down that we protest against any procedure which makes it impossible for the defendants to examine their own case, or familiarize themselves with certain technicalities, that they, as lay people, certainly

cannot do in forty-eight hours or even three or four days; so, under protest, we will examine the jurors.

The Court: Very good.

(Instructions by Mr. Content to Mr. Berkman.)

Mr. Berkman: Before I proceed, I want it clearly understood that I do so under protest, not having had an opportunity to prepare myself, and being furthermore in physical pain, so that you are putting me at a disadvantage in forcing me to trial against my will without having given me time to prepare.

Mr. Content: Will your Honor have the statement on the record that as prosecuting attorney, I have advised both defendants of the number of peremptory challenges allowed to them and the challenges for cause, and the manner of examination of the jurors.

The Court: Proceed, Mr. Berkman, with the examination of the jury.

(The examination of the jury then proceeded by both the defendants and the prosecuting attorney, continuing through June 27th, 28th and 29th, until late in the afternoon of the 29th, when a jury was finally accepted and sworn.)

New York, July 2nd, 1917, 10.30 A. M.

Trial resumed pursuant to adjournment.

Present:

The Court, Counsel and jury, as before.

The Court: Now, Mr. Content, you may open for the Government.

(Mr. Content opened the case to the jury on behalf of the Government.)

Mr. Berkman: The defense wants to make a motion for dismissal on several grounds.

The Court: I made the motion for you at the beginning of the case.

Mr. Berkman: I know, but——

The Court: Before Mr. Content opens you may make your motion if you want to.

Mr. Berkman: We move to dismiss the indictment for the following reasons:

1. It does not charge a crime.

2. The conscription law is unconstitutional because it involves involuntary servitude in the army, in the navy and in industrial and agricultural service.

3. The conscription law violates the moral, ethical and religious beliefs of the people of the United States.

4. The conscription law violates the conscience of the people, who are opposed to war, for the reason that human life is sacred.

5. Because the conscription law is highly immoral and prejudicial to the best interests of the country, because it is not to the best interests of the country to force people to act contrary to their judgment and their conscience.

6. Because the United States has not been invaded, nor is it in any danger of invasion, nor is it in any condition of rebellion, and therefore the law is not of a defensive but of an offensive character.

7. Because it is not just to force an American citizen to die on foreign soil against his will and deprive him of the opportunity to die in his own native country.

For all these reasons we ask that the case and the indictment be dismissed.

The Court: Motion denied. You may reserve an exception.

Mr. Berkman: Exception taken.

The Court: Very good. Now, Mr. Content.

MARY ELEANOR FITZGERALD, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Where do you reside? A. My office is 20 East 125th Street.

Q. Where do you reside, I asked you? A. With friends in Connecticut.

Q. Where do you reside in New York City? A. Why, I have no residence in New York City.

Q. Aren't you living here now? A. No, when I am in the city, my address, business address, is 20 East 125th Street; and when I am staying in the city, I usually stay in the Brevoort Hotel.

Q. Where is your residence in Connecticut? A. Stamford, Connecticut.

Q. Is there any particular street address? A. No.

Q. Your mailing address is Miss Mary Eleanor Fitzgerald, Stamford, Connecticut? A. No, sir, my mail, I told you, is usually addressed to 20 East 125th Street.

Q. Now, what is 20 East 125th Street? A. Why, the office of *Mother Earth*.

Q. Is it the office of any other such publication or magazine? A. On the upper floor is the office of *The Blast*.

Q. Is it the office of any other association, volunteer or incorporated?

Mr. Berkman: I want to ask some instructions of the Court. There are certain things that the defense is perfectly willing to admit, as for instance, that the No-Con-

scription League has its office at 20 East 125th Street; but I think it will facilitate matters quite a little by either myself or Miss Goldman simply saying, "Yes, we admit it." For instance, it is admitted——

The Court: Yes, certainly.

Mr. Content: That will help a great deal, but I think Miss Fitzgerald can answer the question.

The Court: She can answer the question. There is some organization called the No-Conscription League—is that correct?

The Witness: Yes, we have the No-Conscription League. The address is 20 East 125th Street.

The Court: Is that where it has its office?

The Witness: Yes.

Q. How many floors of 20 East 125th Street are occupied by *Mother Earth* or *The Blast* or the No-Conscription League? A. Why, *Mother Earth* is on—if you count the ground floor as the first floor, *Mother Earth* is on the second floor, the *Blast* office on the third floor.

Q. Where are—on which floor are the offices of the No-Conscription League? A. Well, I have—I was the financial secretary of the League, and so most of the work was done in the office of *The Blast*, as my desk is in that office.

Q. Now, the office of *The Blast* would be on what you call the third floor, is that correct? A. It is.

Q. And is the literature of the No-Conscription League stored in the second floor in the office of *Mother Earth?* A. I don't know whether it was or not.

Q. Don't you really know? A. No, I don't know, Mr. Content.

Mr. Berkman: Hold on a minute. May I say something here? The defense admits the

No-Conscription League had its work done in the office of *The Blast,* and that the office of *The Blast* is one floor, or rather one room, a little more, and the office of *Mother Earth* is another floor. There is no use wasting time about that.

Mr. Content: But the jury don't understand these things.

Mr. Berkman: One hall and but only a few steps between one office and another office.

Mr. Content: Why can't she say that?

Mr. Berkman: Sometimes bundles will be carried from one office to another.

Mr. Content: The question is whether the literature was stored in the *Mother Earth* office on the second floor, and she said she didn't know.

Mr. Berkman: Well, she is not the editor in the department of literature.

Mr. Content: When you get on the stand you will have a chance to tell.

The Court: Everything else that you did, Mr. Berkman, except this last, was all right. You cannot state the evidence of the witnesses. You can make an admission, or you can object as you have done. For instance, if some of these witnesses go on the stand, you cannot state their evidence, as their evidence will be stated on the stand.

Mr. Berkman: Exception.

Q. Is the No-Conscription League incorporated? A. No.

Q. Is it what you call a voluntary association? A. It is a voluntary association or group, whatever you want to call it.

Q. Are there any officers of this association? A. I just told you.

The Court: Not officers, but——

Mr. Content: Officials, I mean.

The Witness: I an. the financial secretary.

Q. You are the financial secretary. Is that practically equivalent to treasurer? A. Yes.

Q. Any other officers? A. Leonard Abbott is secretary.

Q. Is there any president? A. No.

Q. No presiding officer? A. No.

Q. Were Mr. Berkman and Miss Goldman members of the association?

Mr. Berkman: I object. We admit we are members.

Mr. Content: I want to examine this witness in an orderly manner.

The Court: He has the right to object.

Mr. Content: He wants to take the stand.

Mr. Berkman: You don't know what I want to do.

The Court: He objected properly, and the statement he is going to make is proper.

Mr. Berkman: I objected to the question, and said I admit that we are members of the No-Conscription League.

Mr. Content: Then why can't Miss Fitzgerald say that you were?

Mr. Berkman: It is admitted.

The Court: Now it is admitted. But, what do you say? You are on the stand? You are asked if these two defendants were members of the League—answer yes or no.

The Witness: Yes.

Q. They were? A. Yes.

Q. Were they officers of the League? A. No, sir, there were only two, as far as I told you.

Q. There were only the two officers you have mentioned? A. Yes.

Q. Were these two defendants prominent in the work of the League? A. I will have to answer that as I did before the Grand Jury.

Q. No, answer it here. A. I said to you that if you meant intelligence and ability and good speakers, then they would be prominent.

Q. I mean did they take an active part in the work? A. They were our best speakers at our meetings.

Q. Did they have anything to do with the compilation of the literature printed by order of the League?

> Mr. Berkman: I object. When certain documents are put in evidence, we will, we are ready to admit our authorship.
>
> The Court: Simply answer the question yes or no.

Q. Yes or no, that is all, whether they had anything to do with the composition of the literature? A. Yes.

Q. Besides being the financial secretary, what other work did you do? A. You mean outside of the League?

Q. Well, in that office, that is, 20 East 125th Street? A. Well, I am associated with Mr. Berkman, I help him on the magazine or the paper called *The Blast.*

Q. Are you an associate editor of *The Blast?* A. That is what it would be considered.

Q. Do you write any of the articles yourself for it? A. I have written articles for it.

Q. In the June issue, is there any article by yourself in that? A. No.

Q. And did you assist in any way in making up the June issue of *The Blast?* A. Why, I helped in getting up all the issues, yes.

Q. Suppose you just give us a general idea of what your work consists of, as what you call associate worker for *The Blast?* A. Writing and typing articles, and preparing them for the printer, or proofreading, or making up the dummy pages.

if you understand what that is; answering correspondence; dictation, etc.; clerical work.

Q. Have you any connection with *Mother Earth* or Miss Goldman? A. No, I have no official connection with *Mother Earth* or Miss Goldman, except as a friend, I have helped Miss Goldman with some of her correspondence since I have been in New York.

Q. Well, you have done certain stenographic work for Miss Goldman, since you have been in New York, have you not? A. Not in an official capacity, not as an officer in her office, but simply as a friend I have helped her with some of her correspondence and some of her lectures.

Q. Have you had anything to do with *Mother Earth* at all, in the nature of proofreading or copying? A. No.

Q. Now, do you receive any salary for acting as financial secretary of the No-Conscription League? A. No, sir, there are no salaries in it.

Q. No remuneration? A. No.

Q. For any of the officers? A. No.

Q. How is the No-Conscription League supported? A. By voluntary contributions from individuals.

Q. Personal appeals? A. Yes, personal appeals.

Q. Through the mail at the times? A. Through letters, and at our meetings, collections at the meetings.

Q. Meetings where a collection is taken from the general public, is that correct, at the meetings? A. Yes.

Q. And then you send personal appeals through letters? A. Yes, that has been done.

Q. Is there any bank account of the League, that is kept by the League, itself? A. You mean a separate bank account?

Q. Yes, a separate bank account. A. No.

Q. Is *Mother Earth* incorporated? A. Not to my knowledge, no—no, I know it is not.

Q. And is it published by the Mother Earth Publishing Association? A. I think they call it the Mother Earth Publishing Association.

Miss Goldman: It is published by the Mother Earth Publishing Association. It is not incorporated.

Q. *The Blast* is not incorporated, either, is it? A. No.

Q. Who is the publisher of *The Blast?* A. Alexander Berkman.

Q. And was that paper published in another city before it was published in New York? A. It was.

Q. In what city? A. San Francisco, California.

Q. What was the date of the last issue, I mean what was the month of the last issue in California —do you recollect? A. March, I think, 1917. I think we missed the April issue.

Q. You missed the April issue? A. I think I am correct on that. I would have to look at the file. I think we missed the April issue on account of lack of funds.

Q. Was there one issue published in New York in May, 1917? A. There were two issues published in New York.

Q. Up to date? A. Yes, May and June.

Q. Do you know who the printer of the June issue of *Mother Earth* was?

Mr. Berkman: Objected to as immaterial here. The defense admits that—one of the defendants, Alexander Berkman, admits publication and editorship of *The Blast*, a newspaper published originally in California, but recently and temporarily brought to New York. We published the May and June issues in New York City. Who the printer is is quite immaterial.

Mr. Content: I don't think it is. I have the right to show the way in which it was printed, and all that.

Mr. Berkman: I object. The paper itself shows that.

The Court: No, the paper would not be self-proving. You may answer who the printer was. You may have an exception.

Mr. Berkman: Exception.

Q. Do you know who the printer of *The Blast,* of the June issue of *The Blast* was?

Mr. Berkman: That is quite immaterial.

A. Yes, I know the name.

Q. Who was it? A. Which issue?

Q. The June issue, 1917? A. The Grayzel Press.

Q. Do you know the name of the printer of the June issue of *Mother Earth,* who it was? A. The Grayzel Press.

Q. Who is the publisher of *Mother Earth?* A. Emma Goldman.

Q. Will you tell me about what date the so-called No-Conscription League was formed? A. Well, I think, I am not sure, the first meeting, a little gathering, was on May 9th.

Q. May 9th. Where was that held, that gathering? A. It was held in the apartment of Miss Goldman, at 603 West 139th Street.

Q. And was Mr. Berkman present at that meeting? A. Yes.

Q. Was Miss Goldman present? A. Yes, Miss Goldman was present.

Q. Were you present? A. I was.

Q. How many others were present, approximately? A. About thirty or thirty-five, perhaps.

Q. Was Leonard D. Abbott present at that meeting? A. Am I to answer that?

The Court: Yes.
Mr. Content: Yes.
The Witness: Yes.

Q. Was Dr. Reitman present at that meeting? A. No.

Q. Were any resolutions offered at that meeting of any sort? A. That meeting was called for the sole purpose of organizing a protest meeting against the registration law, conscription law, which had not been passed at that time. This was the 9th of May.

Q. So I understand. This is only historical. A. Yes, and that meeting was called for the sole purpose of planning or organizing a large protest meeting against this conscription law that was about to go into effect, or that was being talked about in Congress. That little gathering, preliminary gathering, was for that purpose.

Q. But it was at that little gathering Mr. Abbott was chosen as secretary of the League and yourself as financial secretary? A. At that little gathering that evening.

Q. Was your selection as secretary the result of a popular choice, or were you appointed by Miss Goldman or Mr. Berkman, or how did you come to be financial secretary? A. Why, I was appointed—it was agreed by the whole crowd of people that were there.

Q. In other words, you were agreeable to everybody present? A. Yes.

Q. Was there a regular ballot taken, or was it sort of informal? A. No, it was informal.

Q. And the same would hold true of Mr. Abbott's selection? A. Yes.

Q. Was anything further done on that occasion? A. No, except we decided to get out letterheads and envelopes.

Q. That was decided on that occasion? A. Yes, and it was decided to get out a manifesto on that occasion, to be distributed at our meetings.

Q. Now, I show you a bundle of so-called manifestoes, are these the kind of documents you referred to, that you just referred to as manifestoes? A. Yes.

Mr. Berkman: The defense admits issuing these documents.

Mr. Content: No, that is not the question. The question I asked has to do with what she referred to in her testimony.

The Court: You may take Mr. Berkman's answer, and let the witness answer.

Q. Does this represent what you refer to in your testimony by the word "manifesto" in your previous answer? A. Yes, that is the manifesto.

Mr. Content: I ask to have this marked for identification. One of these will do.

(Marked Government's Exhibit No. 1 for Identification.)

Q. Now, you say it was decided at that meeting to issue these manifestoes. Let me ask you this:

Miss Goldman: May I say something to facilitate matters? It was not decided at that meeting to publish this manifesto.

Mr. Content: Now Miss Goldman is testifying. Now, if you will only let me go ahead, I will get ahead much more quickly.

The Court: Yes, make a note of it, and when Mr. Content is through, if you think Miss Fitzgerald has made any errors, you can ask her questions.

Mr. Content: Yes, I think we will proceed much more effectively.

Miss Goldman: All right, then.

Mr. Berkman: We do not deny that document. It is only a question of the date.

Q. Now, at this time, had the subject matter of these manifestoes been decided upon? A. No.

Q. It was merely decided, according to your testimony, that some sort of a manifesto was to be gotten up? A. Yes, merely obtain the information. The main purpose of that meeting was to plan a large protest meeting.

Q. Well, this Government's Exhibit 1 for Identification, when was the subject matter of that passed on—only approximately? A. I can't tell you that, I don't know.

Q. Was it before the meeting of May 18, 1917? A. That I know. It was before the meeting of May 18th.

Q. And your best recollection would be that it was after this informal meeting? A. Yes.

Q. It had not been printed at that meeting? A. No.

Q. So that it was somewhere between those dates? A. That is my best recollection. I have no records, because you have them all.

Q. Do you know who composed the subject matter of this Government's Exhibit 1 for Identification? A. My understanding is of that manifesto that Miss Goldman wrote it.

Q. And do you know what printer physically printed that manifesto—just do you know it? A. Yes.

Q. Who was it? A. The Graphic Press.

Q. Do you know who placed the order for printing of these manifestoes? A. No, sir, I cannot tell you.

Q. After this informal meeting of May 8th—this informal meeting was May 8th? A. May 9th.

Q. Well, when was there another meeting held? A. There was a little preliminary meeting on the 16th of May.

Q. Where was that held? A. Planning for funds, arranging for committees, etc., for this meeting of May 18th.

Q. Where was this meeting held on the 16th? A. The May 16th meeting was held in the office of *The Blast*, or the *Mother Earth*.

Q. Somewhere at 20 East 125th Street? A. Yes, sir, 20 East 125th Street.

Q. At whatever headquarters there were of the No-Conscription League itself? A. Yes.

Q. Was Mr. Berkman present at this meeting of May 16th?

> Mr. Berkman: No. The defense admits Mr. Berkman was present.
>
> The Court: What is your recollection?
>
> The Witness: My recollection is he was present at that little gathering.

Q. And is it your recollection, Miss Goldman was present or not?

> Miss Goldman: She was present.
>
> Mr. Content: I am asking for the witness's recollection.
>
> The Court: The stenographer will take the statement of the defendant and of the witness.

A. Miss Goldman was present.

Q. Were you present? A. I was.

Q. Was Mr. Abbott present? A. No.

Q. How many others were present besides Mr. Berkman, Miss Goldman, and yourself, approximately—always approximately? A. Oh, perhaps fifteen or twenty people.

Q. And the meeting, that is of May 18, 1917, was held where? A. It was held at what is known as the Harlem River Casino.

Q. Is that an auditorium or a hall? A. I think it is called a hall, it is a large hall.

Q. Were you present at that meeting? A. I was.

Q. And that was the night of May 18th? A. The night of May 18th.

Q. Was Miss Goldman a speaker at that meeting, according to your recollection? A. She was.

Q. Was Mr. Berkman a speaker at that meeting according to your recollection? A. Yes.

Q. Your best recollection is that Miss Goldman did speak, whether you heard her speech or not? A. Yes.

Q. And do you know how much was paid for the rental of the auditorium or hall on that evening? A. Yes, I know.

Q. What was it? A. Fifty dollars.

Q. Did you pay the fifty dollars personally? A. I paid part of it.

Q. Did you pay the part of the fifty dollars, yourself, you personally? A. I did.

Mr. Berkman: Objection. The defense admits Alexander Berkman gave a deposit for this meeting, and attended to the arrangements.

Mr. Content: That does not agree with her testimony. She said she gave some. Just let me straighten this out.

The Court: Let me get that straight. Did you physically pay the money?

The Witness: I paid a part of it.

Q. Do you remember what part you paid? A. As I remember it, I gave forty dollars.

Q. I show you an original contract, signed No-Conscription League, and in ink Alexander Berkman, and——

Mr. Berkman: This is my signature, and the defense admits this signature as being that of Alexander Berkman.

Mr. Content: Do you concede you paid a ten-dollar deposit?

Mr. Berkman: I do not concede. I made a statement that I made the arrangements for the meeting and paid a deposit of ten dollars for the meeting. I am quite sure it was ten dollars.

Q. I show you a duplicate copy, and ask whether that is the receipt you obtained from Mr. Motz, manager or proprietor of this Harlem River Park and Casino? A. Yes, I should say that was the duplicate he gave me.

Q. At the time you paid the balance due? A. Yes.

Q. Did you pay that balance on the night of the meeting? A. The night of the meeting.

Q. Was it in cash, or check, if you recall? A. By check.

Mr. Content: I offer in evidence the duplicate receipt, and ask to have the original marked for identification. No, I offer this in evidence. Mr. Berkman concedes this signature.

The Court: Yes.

Mr. Content: I offer the original contract, and the receipted contract in evidence.

(The original contract was marked Government's Exhibit No. 2 and the duplicate receipt was marked Government's Exhibit No. 3.)

Mr. Content: This is the original. I want to read the whole contract. (Reads to the jury.)

Q. Miss Fitzgerald, I show you the letterhead of the No-Conscription League, 20 East 125th Street, and ask you whether or not that was printed by the Graphic Press, the letterhead? A. I can't say.

Q. What is your best impression? A. I really don't know.

Q. Now, this work is multigraph work, the body of this circular letter which I show you? A. Yes, that is multigraph work.

Q. By whom was that multigraph work done, do you know? A. I don't know who did that multigraph work.

Q. You really don't? A. I don't know.

Q. Were you not the financial secretary of the League? A. I cannot tell without you give me our records to look through.

Q. Which records do you want? A. The bills and things.

Mr. Berkman: The defense is going to admit every document that we issued, every signature that is genuine and all of our work that was done. But there was so much work done in that office, for various purposes, downstairs the *Mother Earth*, upstairs *The Blast* and No-Conscription League, and then we had various other troubles, sickness, etc., so that there is no way for any particular person to know all about the work done.

Q. Then you do not remember who did that multigraphing work? A. I can't tell you what multigraph company did that, without seeing the receipted bill—I mean that particular letter.

Q. Did you give the work to different multigraph companies?

Mr. Berkman: Certainly.

A. Well, there were different companies that did different letters, and I don't know which one did that one.

Q. Just take and look at this letter dated May 25, 1917. You have seen that form letter before? A. Yes.

Q. Is this one of the regular form letters of the No-Conscription League? A. Yes.

Q. And were letters of this type sent out through the mails? A. Through the mail to different lists.

Q. How—where did you obtain your lists? A. Well, I had them——

Mr. Berkman: Exception. The defense admits the *Mother Earth* and *The Blast* lists were used for that purpose.

Q. Mr. Berkman has stated the *Mother Earth* and *The Blast* lists were used for that purpose. Didn't you send them to people who were not on either of those lists? A. Yes, there were several lists that were used, different lists.

Q. For example, I received one, and I am not a subscriber to *Mother Earth*. Do you know how they would obtain a name like mine—not that that is in evidence, but I just mention that, because I am not a subscriber.

Miss Goldman: Miss Fitzgerald has already stated that she has been in the office only a very short time, having come from California. Now, in the office of *Mother Earth* and *The Blast* we have at least a dozen different lists, used for a dozen different purposes, and Miss Fitzgerald uses the list.

The Court: Now, that is perfectly all right, that is perfectly proper. Mr. Berkman said, as I understand it, and you may correct me if I am in error, that there was a *Mother Earth* list and a *Blast* list, to whom you sent this paper which has just been shown you by Mr. Content?

The Witness: Yes.

The Court: Now, you also said there was some other list.

The Witness: There were some others.

The Court: Now, what were those lists?

The Witness: Well, there were lists I got from Miss Goldman, I don't know where she got them.

Mr. Content: That is an answer. That is all I want.

The Court: And by lists, you mean collections of names and addresses?

The Witness: Yes.

Mr. Content: That is all I want.

Q. Now, look at this form letter, which is undated——

The Court: By the way, this other one, you better have marked.

Mr. Content: I will have this marked for identification, Government's Exhibit 4 for Identification.

(Marked Government's Exhibit No. 4 for Identification.)

Q. I show you another form letter, beginning, "Dear Friend," and ask you is that one of the form letters sent out by the No-Conscription League? A. Yes, this is one of the form letters.

Q. And your testimony with regard to Government's Exhibit 4 for Identification would also apply to this one? I mean the same would be true of this letter as of the previous letters. A. In what respect?

Q. I mean as to its being sent out according to lists? A. Yes.

Mr. Content: I ask this to be marked for identification.

(Marked Government's Exhibit 5 for Identification.)

Mr. Content: That is an undated one.

Q. I show you a third, dated June 7, 1917, and I ask you is that, too, a form letter of the No-Conscription League? A. May I see both of those letters again?

Q. Surely (handing same to witness). I think this is the first, this was what I showed to you first, it is dated May 25. And this is the second one, that is undated. The first one which I showed you was dated May 25th, 1917, and the second was undated, and the third dated June 7. Now, will you answer this question, first—is the one of June 7th also a form letter? A. Yes, those are form letters, but I am trying to figure out the difference in these two letters.

Q. There is very little difference between the undated one and the one of June 7th. I think the one of June 7th acknowledges the receipt of a communication. A. Yes, those are form letters.

Q. All three are form letters? A. Yes.

Q. All sent out according to lists? A. Yes.

Q. Either from *Mother Earth* or some other list as submitted to you by Miss Goldman? A. Yes.

(Letter of June 7th, marked Government's Exhibit 6 for Identification.)

The Witness: Mr. Content, one of those letters is an answer to their sending funds to us.

Q. That is the one of June 7th? A. Yes.

Q. That is Government's Exhibit 6 for Identification? A. Yes.

The Court: Let me ask something before I forget it. When was this name, "No-Conscription League," adopted—was that adopted at that first meeting on the 9th of May?

The Witness: At the first meeting.

Q. That is the informal meeting held at Miss Goldman's apartments? A. Yes, the very first meeting held.

Q. I show you an envelope addressed William C. Demorest, 18 East 94th Street, on the letterhead of the No-Conscription League, and I show you a form

letter of May 25, 1917. Just look at them, and say whether it corresponds with Government's Exhibit 4 for Identification—that is, the same letter I previously showed you? A. Yes.

Q. I show you this manifesto, and ask you whether that is the same as Government's Exhibit 1 for Identification, the first one I showed you? A. It is.

Q. For identification, I mean, Exhibit No. 1? A. A. Yes.

Q. I show you a hand bill, announcing the meeting of June 4, and ask you whether that hand bill was gotten out by the No-Conscription League? A. It was.

Q. And would the same be true of the hand bill as of the other documents?

Mr. Berkman: Objection. The defense admits having hand bills for each particular mass meeting.

Q. I will show you this hand bill. Do you concede that is one of the hand bills of the No-Conscription League?

Mr. Berkman: This is one of the hand bills issued by the No-Conscription League for one meeting.

Mr. Content: I want to ask whether this letter and those enclosures were sent out at the direction of the League, Miss Goldman, and yourself. You don't have to admit it, if you don't want to.

Mr. Berkman: The No-Conscription circular and the No-Conscription hand bill, and the circular letter?

Mr. Content: Of May 25th.

Mr. Berkman: Of May 25th. The defense admits these were sent to various people.

Mr. Content: Through the mail?

Mr. Berkman: Through the mail, yes.

Mr. Content: I ask to have these three marked for identification.

(Marked for identification as follows:)

The Court: They will be marked Government's Exhibit 7 for Identification.

Mr. Content: 7-A, 7-B and 7-C.

The Court: 7-A, 7-B, 7-C.

Mr. Content: Mark the envelope A.

The Court: Are there just the two?

Mr. Content: There are 3 enclosures. Mark the envelope 7, the circular 7-A, the hand bill 7-B and the manifesto 7-C.

(Marked 7, 7-A, 7-B and 7-C for Identification.)

Q. I show you a rubber stamp, "Alexander Berkman," and ask if you know whether that was placed there with Mr. Berkman's consent, or direction?

Mr. Berkman: Objection. The defense admits that whenever Mr. Berkman was too busy, or probably sick, the direction was to use his rubber stamp.

Mr. Content: Then this rubber stamp, "Alexander Berkman," was put there with your consent——

Mr. Berkman: Yes, sir, to that document, it was put by my direction and request.

Mr. Content: I show you—maybe we can save time by speaking together. Here is another one of the same type, sent to the City Editor of the *New York Times,* exactly the same. The only difference is that this has no handbill, and it has a subscription blank.

Mr. Berkman: Yes. Similar letters were sent to the editors of the press, not because we considered them friends, but simply to let them know about the work being done.

Mr. Content: Then you concede that this letter to the City Editor of the *Times,* with

its inclosures, was sent out by your directions?

Mr. Berkman: By my directions, yes.

Mr. Content: A letter and manifesto and subscription list.

Mr. Berkman: Yes, by my direction.

Mr. Content: Now I ask this be marked Government's Exhibit 8 for Identification, that is the envelope, and 8-A for the letter, and 8-B the manifesto, and 8-C the subscription blank.

(Marked Government's Exhibits 8 and 8-A for Identification.)

Mr. Content: I have another one, Mr. Berkman. I think that is all I will cover. It is the same thing.

Mr. Berkman: That is the same letter, that is admitted.

Mr. Content: I will only ask to have the envelope marked in this case. A letter addressed to Clarence Lyman Collins, postmarked May 30, 1917, Station L, was shown to Mr. Berkman, and he said that that, too, was sent out the same as the others.

Mr. Berkman: It was sent out in the general work of the No-Conscription League.

Mr. Content: Mark the envelope Government's Exhibit 9.

(Marked Government's Exhibit 9.)

Mr. Content: Now, I show you another letter, postmarked New York, May 25, 1917, containing, or rather contained in the envelope of the No-Conscription League, addressed to Frank Harrison, of Denver, Colorado, and I show you the same circular letter of May 25, 1917, and with a rubber stamp, "Emma Goldman." Will you please state whether or not the rubber stamp was placed there by Miss Goldman's direction.

Mr. Berkman: Objection. The defense will simplify matters by explaining that the same circular letter was sent out to the subscribers of *The Blast,* the paper of which I am editor, and those were signed in my name; and the same letter was sent out by Miss Goldman to the subscribers to her magazine, and signed by her or by her rubber stamp.

Mr. Content: Will Miss Goldman concede the rubber stamp was put there with her consent?

Miss Goldman: If I may state now, I have done a great deal of lecturing all over the country, and I cannot sign all the letters, but a rubber stamp is used in the office to sign letters that go out to *Mother Earth* subscribers.

The Court: The only question is, whether this was done with your consent and direction—that is the question.

Miss Goldman: Is that the same letter?

Mr. Content: Yes, that is the same letter there with the rubber stamp, "Emma Goldman."

Miss Goldman: Yes, done with my consent.

Mr. Content: That will simplify it very much.

Miss Goldman: Yes.

Mr. Content: I offer that other one here in evidence, with Miss Goldman's signature, the letter to Harrison, and ask to have this marked Government's Exhibit 10 for Identification.

The Court: That is the letter to Harrison?

Mr. Content: Yes, May 9.

The Court: Exhibit 10 is the envelope to Frank Harrison, 10-A the letter of May 25, and 10-B, the manifesto.

Mr. Content: I think we will use the term "manifesto," thereby simplifying matters.

The Court: Yes, Miss Fitzgerald said that.

Mr. Content: And 10-C is the subscription blank.

The Court: I think you failed to note the contents of Government's Exhibit 9 for Identification.

Mr. Content: I did not offer that. I did not have that marked separately. I showed it to Mr. Berkman, and they were exactly the same as Exhibit 8.

The Court: Very good. That is Government's Exhibit 9 for Identification, the envelope with the contents.

Mr. Content: Yes, the envelope with the contents, and they are exactly the same as Government's Exhibit 8 for Identification.

The Court: Very good.

Mr. Content: And this is Government's Exhibit 10 for Identification (indicating).

A. I want to say something regarding those letters.

Q. Surely.

The Court: Yes.

A. I want to explain in using Mr. Berkman's name and Miss Goldman's name, having charge of sending out these lists, I got the *Mother Earth* list from Miss Goldman, and I used *The Blast* list, or the people that know Mr. Berkman, from *The Blast* list, and sent this letter. To the people that have known Mr. Berkman, I put on the rubber stamp, Alexander Berkman, and on the *Mother Earth* list, the ones that know Miss Goldman, I had her stamp put on. I just didn't want you to misunderstand that. Some were signed in my own name.

Q. Take Government's Exhibit 7, addressed to Mr. Demorest, who does not happen to be a sub-

scriber to either of the publications, which letter was signed, "Alexander Berkman." Do you recall where you got the list concerning his name? A. I cannot.

Q. Now, I show you a telephone contract, dated May 12, 1917, and ask you whether that is Mr. Berkman's signature on the right-hand side? A. Yes, that is Mr. Berkman's signature.

Q. I show you a——

Mr. Berkman: May I see that, please (handed to Mr. Berkman). That is my signature, yes. The defense admits the signature of Mr. Berkman.

Mr. Content: I ask to have this marked for identification.

(Marked Government's Exhibit No. 11 for Identification.)

Q. I show you a telephone contract dated December 30, 1914, signed Alexander Berkman, by Emma Goldman, Attorney-in-fact, and ask you whether that is Miss Goldman's signature? A. You asked me is that Miss Goldman's signature?

Q. Yes, Alexander Berkman, by Emma Goldman, Attorney-in-fact? A. I would say it was her signature.

The Court: You have seen her write?

The Witness: Yes.

Q. You are familiar with her handwriting? A. Yes.

Miss Goldman: May the defense see it? (Same handed to Miss Goldman.) Yes, that is my signature, yes, indeed.

Mr. Content: I ask to have this marked for identification as Government's Exhibit No. 12?

Mr. Berkman: Is that the first contract?

Mr. Content: Yes.

Mr. Berkman: 1914?

Mr. Content: 1914, and has been renewed from time to time. That is the original (indicating).

Q. Miss Fitzgerald, I show you a receipt of the Walker Engraving Company for engraving work.

Miss Goldman: Objection. I have always dealt with the Walker Engraving Company myself.

Mr. Content: I have not asked a question.

The Court: Wait a moment.

Q. (Continuing) And I ask whether that is Mr. Berkman's signature attached to the receipt, dated May 14?

The Court: What year.

Mr. Content: This year. It is not dated, but it has reference to this year.

A. Yes, I think so, I would say it is Mr. Berkman's signature.

Q. You have seen him write? A. Yes.

Q. You are familiar with his signature? A. Yes.

Mr. Berkman: May the defense see that?

Mr. Content: Yes (handing Mr. Berkman paper).

Mr. Berkman: That is my signature. The defense admits this signature.

Mr. Content: I ask to have that marked Government's Exhibit 13 for Identification.

(Marked Government's Exhibit 13 for Identification.)

The Court: Was that May 14, 1917?

Mr. Content: Yes.

Mr. Content: Well, I produce another receipt of the Walker Engraving Company for a large engraving marked "Conscientious

Objector," and ask Mr. Berkman whether he wants to concede that that is his signature to the receipt.

Mr. Berkman: I will say that is a receipt for another electrotype.

Mr. Content: Well, that is the copy, you know, not the original.

Mr. Berkman: Yes.

Mr. Content: The copy.

Mr. Berkman: That is the copy, I know I signed for it.

Mr. Content: Then, this is Government's Exhibit 14 for Identification. (Same so marked.)

Mr. Content: I show Miss Goldman a copy of a lithographic engraving entitled, "June 5, in memoriam," and ask whether that is the signature of the Mother Earth Publishing Association?

Miss Goldman: Yes, it belongs to *Mother Earth.*

Mr. Content: I ask to have that marked Government's Exhibit 15 for Identification?

(Marked Government's Exhibit 15 for Identification.)

Mr. Content: I show you, Mr. Berkman, an engraving by Maurice Becker, with the words "Free Russia" in one part thereof, and ask you whether you will concede that was delivered to you?

Mr. Berkman: Yes, the cut of a cartoon for the cover of the last issue of *The Blast.*

Mr. Content: The cut for the cover of the last issue of *The Blast.* I ask to have that marked Government's Exhibit 16 for Identification?

(Marked Government's Exhibit 16 for Identification.)

Q. Now, Miss Fitzgerald, I show you two wrappers containing publications which were found in

the office of *Mother Earth* or the No-Conscription League, on the day of the arrest of Emma Goldman and Alexander Berkman. Do you know if you can identify these, tell us what they are?

Mr. Berkman: Objection, on the following grounds: As hundreds, maybe thousands, of copies of these have been sent out, it will be quite impossible for anyone to identify one particular wrapper.

Mr. Content: She may examine them, take them out, and tell what they are.

Mr. Berkman: But the defense will concede that hundreds of such packages were being sent out all the time by *Mother Earth*, and by *The Blast*, for the furtherance of their work.

Miss Goldman: Your Honor, this is the magazine, *Mother Earth*, which goes out every month for the last twelve years.

Mr. Content: Then it is conceded these are the issues of *Mother Earth* of June, 1917, which were placed in wrappers for the purpose of going out.

Miss Goldman: If that is the magazine, then I admit it.

Mr. Content: They were placed in wrappers for the purpose of being sent out.

Miss Goldman: They were.

The Court: What issue?

Mr. Content: June, 1917.

The Court: Have they been marked?

Mr. Content: It is not necessary at this time because I will offer them all later through the special agent.

The Court: Very well.

Q. Now, Miss Fitzgerald, you have stated in a previous part of your examination, that the No-Conscription League was supported by voluntary contributions, and it had no special bank account of

its own in its own name, is that correct? A. That is correct.

Q. What was done with the moneys collected at these several meetings, which were held under the auspices of this so-called No-Conscription League? A. The moneys that were collected in the meetings?

Q. Yes. A. Well, the money collected in the meetings, hardly covered the expense of the different meetings.

Q. I didn't mean that. I meant was it paid out direct, in cash, or put in bank deposits, or what was done with it, physically? A. Some was paid out in cash, some was put in the bank, and then paid out.

Q. What bank? A. You mean the name of the bank?

Q. Yes. A. The Produce Exchange Bank.

Q. Is that the Harlem Branch? A. Yes.

Q. The moneys that were placed in the Produce Exchange Bank, in whose account were they placed, to the credit of whose account?

The Court: In whose name?

A. Well, checks and money, ones that came in for the No-Conscription League, I endorsed over to Alexander Berkman, and they were put under his account.

Q. I show you a letter of June 4, 1917, signed Alexander Berkman, and addressed to the New York Produce Exchange Bank, and ask you whether that is Mr. Berkman's signature on the one side, and yours in the left-hand corner? A. No, I signed both of them, I wrote the letter.

Q. You wrote that letter? A. Yes.

Q. On the typewriter? A. Yes, sir, on the typewriter.

Q. And signed both? A. I signed both.

The Court: Was that with Mr. Berkman's consent?

The Witness: Yes. May I explain?

Mr. Content: Yes.

The Witness: I sent a young man to the bank with some No-Conscription checks, etc., for the No-Conscription League, and I had instructed him to have them deposited to Mr. Berkman's credit, because we were using just the one check book, and the bank refused to do that, unless I should sign a statement, or Mr. Berkman would sign a statement, to the house that it was all right, and so this was done in compliance with the request of the bank.

Mr. Content: Well, I offer this in evidence. (Same handed to Mr. Berkman.)

The Court: It is just an authority to the bank to accept Miss Fitzgerald's deposits.

Mr. Content: I offer it in evidence.

Mr. Berkman: No objection.

(Marked Government's Exhibit No. 17 in Evidence.)

Mr. Content: This is on the letterhead of the No-Conscription League, Leonard D. Abbott, Secretary, M. E. Fitzgerald, Financial Secretary, telephone Harlem 6194, No-Conscription League, 20 East 125th Street, New York. (Reading Exhibit No. 17.)

Q. Now, Miss Fitzgerald, I show you a stub check book of the Produce Exchange Bank, and ask you whether that is the stub check book of Alexander Berkman? A. Yes.

Q. When did you come to New York, this last time, I mean? A. I have been here about two months. I don't know the date when I came.

Q. Well, now, this Produce Exchange Bank, was that Mr. Berkman's personal account? A. He had different funds, for *The Blast*, his personal——

Q. That is what I mean. What does this account represent, funds of *The Blast*, that is, the publication? A. Yes.

Q. I ask you now whether that is the personal account of Mr. Berkman, and what funds are deposited in that account? A. A personal account, and different funds of *The Blast,* funds for different labor defense funds——

Q. And what else? A. And funds I turned over to the No-Conscription League fund.

Q. Is that about all—*The Blast,* and these labor funds, and these personal accounts, and the No-Conscription League? A. Yes, so far as I can recall them.

Q. I show you a stub of check No. 58, May 7, Graphic Press, whose handwriting is the stub in? A. Alexander Berkman's.

Q. The stub check No. 59, May 9th, in whose handwriting is that? A. Mr. Berkman's.

Q. And No. 60, B. L. Michael? A. The same.

Mr. Content: That is May 11, 1917.

Q. And 61, May 12, is that Mr. Berkman's also? A. Yes.

Mr. Content: That is Sachs & Steinfeld.

Q. Then I show you 62, 63, and 64, stubs addressed to three different newspapers. Are those in Mr. Berkman's handwriting? A. Yes.

Q. And 65 and 66, two checks to *Die Warheit,* is that Mr. Berkman's handwriting? A. I would say they were.

Q. And No. 67, May 15, is that your handwriting, to *The Call?* A. That is my handwriting.

Q. And No. 68, is that Mr. Berkman's? A. I would say it was.

Q. And 69 and 70, are those yours? A. Those are mine.

Q. 71, is that yours? A. That is mine.

Q. No. 72, is that Mr. Berkman's, to the Graphic Press? A. Yes.

Q. May 21, 1917? A. Yes.

Q. 72, Harlem Park Casino, May 18, is that your handwriting? A. Yes.

Q. No. 74, May 21, Howard Minor, is that your handwriting? A. Yes.

Q. And the same as to No. 75, to *The Call?* A. Yes.

Q. And 76? A. Yes, those are for ads. for the meetings.

Q. 77, salary, janitor? A. My handwriting.

Q. 79, cash, is that Alexander Berkman's? A. I should say it was Mr. Berkman.

Q. 78, Hunt's Point Palace, the 28th of May, 1915, is that your handwriting, $25? A. Yes.

Q. And No. 80, the Graphic Press, May 31, is that yours? A. Yes.

Q. And No. 81, another one to the Graphic Press, is that your handwriting? A. Yes.

Q. And 82, 83 and 84, are those in your handwriting? A. Yes.

Mr. Content: All dated June 2nd.

Q. And 85, 86 and 87, are your handwriting? A. Yes.

Q. And 88, 89 and 90, are those your handwriting? A. Yes, mine.

Q. And Nos. 91, 92 and 93, all yours? A. All mine.

Q. And is No. 94 yours? A. Yes.

Q. Mrs. E. J. Ballantine? A. Yes.

Q. And 95, is that Mr. Berkman's, Alexander Berkman? A. Yes.

Q. 96, is to the Graphic Press, June 11, 1917? A. That is mine.

Q. So that all of those which I have shown you are either in your handwriting or that of Mr. Berkman? A. Yes.

Mr. Content: I offer this check stub book in evidence.

Q. While Mr. Berkman is looking at that, and examining it, I want to ask you whether you sometimes signed Miss Goldman's name as attorney-in-fact on her account in the Produce Exchange Bank? A. Yes, I have an authority to sign Miss Goldman's name.

Q. Does she have an account of her own in the same branch? A. Yes.

Q. Do *Mother Earth* funds go into Miss Goldman's name? A. *Mother Earth* funds? I can't say, I am not sure whether she has a *Mother Earth* account and an Emma Goldman account or not.

Q. But, the No-Conscription funds all went into Mr. Berkman's? A. Yes.

Q. And not into Miss Goldman's account? A. Not to my knowledge.

Q. You were the financial secretary? A. Yes.

Q. And when subscriptions were received through the mails, after they came into your hands, what did you do with them? A. You mean subscriptions for what?

Q. For the No-Conscription League. I am not inquiring into the regular subscriptions to your two magazines. I don't mean that, but subscriptions to this work of the No-Conscription League? A. Yes, they came to me.

Q. And if they were checks, you put them in the Berkman account, in the Produce Exchange Bank? A. Why, we put them in the little No-Conscription League account book which you have there on the table.

Q. That is this book (indicating)? A. Yes, but the deposit was put in the name of Alexander Berkman.

Q. And is this your account book of the receipts of the No-Conscription League? A. Of the No-Conscription League?

Q. Of the No-Conscription League? A. Yes.

Q. I don't mean for the papers. A. Yes.

Q. And was this kept by you from May 11th on?
A. Kept by me.

Mr. Content: I offer this in evidence.

(Same examined by defendant Berkman.)

Mr. Berkman: I cannot understand what object he has for putting this book, this check book in as an exhibit. We would object to putting in amounts, or the record of any amounts prior to May 18.

Mr. Content: Some of this printing was contracted for before May 18th.

Mr. Berkman: Prior to May 18th? The indictment charges something done since May 18th.

Mr. Content: May I just look at that? I may not offer it for that purpose (examining book). All right, I only offer it for those stubs that relate to check transactions since May 18th.

Mr. Berkman: Since May 18th.

The Court: So that that don't take in the one on the evening of May 18th, for that meeting?

The Witness: Yes, there was one on that day.

The Court: Was that included in the offer—it should be.

Mr. Content: That is included. The first check on May 18th is No. 69, and I will not offer anything before that date.

The Court: Very well. 69 and succeeding checks are received.

Mr. Content: 69 to 96, both inclusive.

The Court: And the Clerk may just put a little rubber band at that point, and the preceding checks.

Mr. Content: I will fix that.

The Court: Very well.

(Check book marked Government's Exhibit No. 18 in Evidence.)

Mr. Content: Now I offer the receipt book, the receipts of the No-Conscription League in evidence.

Mr. Berkman: Also since May 18th?

Mr. Content: Now, in this case, I think I have a right to go back of that time.

The Court: He has no objection.

Mr. Berkman: We have no objection.

Mr. Content: I offer this in evidence then.

(Marked Government's Exhibit No. 19 in Evidence.)

Cross-examination by Mr. Berkman.

Q. Miss Fitzgerald, what is the character of your work on *The Blast?* A. Well, I helped with typing the articles, I helped with the proofreading, and helped with making up the dummy pages, to send to the printer, and also in the subscription lists, to see that all the names were entered properly, and so on.

Q. In other words, you were a co-worker, what we know as a co-worker on the paper. A. Yes.

Q. You were co-operating in the work? A. Yes.

Q. When was *The Blast* first established? A. The first issue of *The Blast* appeared in San Francisco, California, on January 15, 1916.

Q. Did it have any connection with *Mother Earth*, or was it an independent paper? A. *The Blast* has always been an absolutely independent paper from *Mother Earth.*

Q. An absolutely independent paper? A. Yes.

Q. Can you tell us how *The Blast* happened to be established, what year do you say it was? A. In 1916.

Q. What month? A. January 15, 1916.

Q. Was that the first issue? A. That was the first issue of *The Blast.*

Q. Where was I at the time? A. You were in San Francisco, California, at the time.

Q. When had I left New York, if you know? A. You left New York in November, 1915.

Q. Up to that time, what was the position that I held on *Mother Earth?* A. Why, you were one of the editors.

Q. Was I the publisher of *Mother Earth?* A. No.

Q. Was I at any time the publisher of *Mother Earth?* A. Not to my knowledge.

Q. I was one of the editors? A. You were one of the editors.

Q. And when did I give up my position as editor of *Mother Earth*, approximately? A. It was in November, 1915, and you started a lecture tour across the country.

Q. You mean about two years ago, approximately? A. Yes.

Q. And since then, have I had any connection with *Mother Earth*, as one of the editors? A. Not at all, no.

Q. And when I left New York in 1914, November— A. 1915.

Q. Did I have any idea of starting a paper in San Francisco?

The Court: You said in 1914, you meant 1915?

The Witness: We left in November, 1915.

Mr. Berkman: I beg your pardon, yes.

Q. Did I have any idea of starting a paper in California, when I left New York, what was the purpose for my leaving New York? A. You left New York to engage in lectures, I arranged these lectures, from New York to San Francisco, a series of lectures in different cities.

Q. I am trying to refresh your memory. You mean you left New York with me, or did you go ahead of me a few weeks— A. I left New York

about ten days or two weeks ahead of you, for Pittsburgh.

Q. What was your purpose in going there? A. I arranged your lectures.

Q. That is, the lecture at Pittsburgh, and at other cities? A. Cleveland, Detroit, Chicago, Denver, Los Angeles, San Francisco, Seattle, Berkeley, Tacoma——

Q. What was the purpose of our leaving New York? A. First arranging lectures, and afterwards

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Q. What was the purpose—I don't mean the object?

The Court: You may suggest the question, to refresh her memory.

Q. Wasn't the object lectures? A. The object was lectures.

Q. Was the object lectures, or the publication of a paper, that is what I want to point out—what was the object of leaving New York to speak in Pittsburgh and other cities? A. To establish a paper on the Coast, and give these lectures——

Q. No, wait a moment. What was the object in November, 1915, did we have any idea of a newspaper in California when we first left New York? A. No, not to my knowledge.

Q. Had I ever been in San Francisco before? A. No, not to my knowledge you had not.

Q. And, therefore, you reached San Francisco before me for the purpose of arranging the lectures? A. That is correct.

Q. Hiring a hall, getting out printed matter, etc., and afterwards, after we were through with the lecture at San Francisco, did we go to Portland, and Seattle, or at least did the speaker go to Portland and Seattle? A. You did, yes.

Q. Do you know whether I returned to New York during that trip? A. During that trip you returned to New York the next summer.

Q. What was the purpose? Had it any connection with some labor organization cases? A. It was in reference to raising funds for a labor organization.

Q. In what city? A. You left from Los Angeles.

Q. And I returned then to New York in connection with labor cases in San Francisco? A. No.

Q. Or, Los Angeles rather, I beg your pardon. A. Yes.

Q. And that was in what year?

The Court: She left in November, 1915, so that it was the next summer, wasn't it?

The Witness: It was the next summer, the summer of 1916.

The Court: You can refresh your memory, if you think it was at some other time.

Mr. Content: I will concede it was the time he said it was.

Mr. Berkman: Well; I think we want to get the dates. It was something very important on my part with regard to a case of labor that I came to New York from the Coast, in a labor case, from Los Angeles, and only after I went back to California did I start *The Blast*.

The Court: What is your recollection of the date?

Mr. Berkman: My recollection is that we left New York in 1914, not 1915.

Mr. Content: What does Mr. Berkman want to bring out by this witness in this part of it? I will concede it.

Mr. Berkman: The point, for the present, is that *The Blast* was established after I had been lecturing in the West for about a year or a year and a half, and that it was the result of the work I had done on the Coast.

The Court: Very good.

Mr. Content: All right.

Mr. Berkman: And that it had absolutely no connection with *Mother Earth.*

Mr. Content: Very well, that is conceded. The Government concedes that.

The Court: Yes.

Mr. Content: At that time.

Mr. Berkman: Yes, at that time.

Q. Now, *The Blast* began in San Francisco on what date? A. January 15, 1916.

Q. How long did it continue there? A. Continued a little over a year, until May 1 of 1917.

Q. Who was the editor of *The Blast* in San Francisco? A. Alexander Berkman.

Q. And then when I had occasion to come East, who remained there as the editor? A. I did.

Q. What was the reason for my coming East? A. In the interest of the labor cause that is now being fought out on the Coast, San Francisco.

Q. In the interest of another labor case, the first was Los Angeles, and the other one San Francisco? A. Yes, the Mooney case.

Q. Did I come to New York permanently or temporarily? A. Temporarily.

Q. On their behalf, that case from San Francisco? A. Yes, that case in San Francisco.

Q. And all the time I was in New York, what was I busy with? A. You were busy gathering funds, getting publicity for this labor case in San Francisco.

Q. Was I busy with it all the time I was in New York? A. As far as I know, you were.

Q. Was it my intention to return to continue the publication, or rather continue to be one of the editors of *The Blast* in San Francisco? A. It was.

Q. And when I found I would have to be here in New York a little longer than expected, did I ask you to bring *The Blast* to New York, permanently or temporarily? A. Temporarily.

Q. It was our intention to publish *The Blast* just a few issues in New York? A. That was my understanding.

Q. Was it your understanding that I intended, or the object was that we were going to go back to San Francisco and continue the publication of the paper there? A. Yes.

Q. Do you know, or do you remember that about two months ago, or so, I had started on my way back to San Francisco? A. Yes.

Q. To continue the publication of *The Blast* there? A. Yes, to continue the publication of *The Blast* there.

Q. How far did I go? A. Why, as far as Chicago.

Q. Went to Chicago? A. Yes.

Q. And when I was in Chicago, did I receive a wire from New York, asking me to return? A. To continue your work for this San Francisco case.

Q. Do you remember that since my return from Chicago, there was organized a large ball in behalf of our San Francisco friends—is that right? A. Yes, I was not here, but I know there was such a thing.

Q. But you have seen the publicity matter? A. Yes.

Q. And you know that was the reason I came back from Chicago to New York? A. Yes, that is my understanding.

Q. And that was the reason I did not continue on my way to San Francisco? A. That is correct.

Q. Now, after my return from Chicago to New York, to take charge of this affair in behalf of the financial interests of the San Francisco friends, what was I busy with, remaining in New York for the time being? A. Busy with this ball, getting advertisements, and speaking to unions.

Q. Addressing labor organizations? A. Yes. I was not here, but that is my knowledge of your work.

Q. Well, you know it from *The Blast?* A. Yes.

Q. And from the publication of all that was going on? A. Yes.

Q. Were any copies of *The Blast* issued in New York? A. Two issues.

Q. How many? A. Two issues, May and June.

Q. How many issues, I mean? A. Just the two issues, May and June.

Mr. Content: May and June.
The Court: 1917?
Mr. Berkman: 1917.

Q. And was it your understanding that *The Blast* would continue to be issued here or would be continued in San Francisco where it belonged? A. My understanding was that a few issues would be brought out here in New York, until you had finished your work for the San Francisco prisoners, and then it would be returned, would go back to San Francisco.

Q. In other words, *The Blast* is published in New York just the two issues, and that temporarily? A. Yes, that's right.

Q. With the idea of returning to San Francisco? A. Yes.

Q. Please tell us the character of the *Mother Earth* office, or *The Blast* office—are they independent offices? A. *The Blast* and *Mother Earth* have always been independent, they are not connected in any way.

Q. Independent offices? A. Yes.

Q. They happened to be in the same building? A. They are in the same building.

Q. Can you give us some explanation, perhaps, for the reason that *The Blast* office is in the same building—do you know where my office was in behalf of the San Francisco cases? A. Yes, 20 East 125th Street.

Q. How many rooms are there in the *Mother Earth* offices? A. Two rooms.

Q. How many rooms are occupied with *Mother Earth* work? A. Two rooms.

Q. Were both rooms occupied with the *Mother Earth* work—I am asking about the front room, the office was the back room? A. The front room of *Mother Earth* was the office, and you were using——

Q. What was I using at the time for my San Francisco work? A. You were using the back room of *Mother Earth's* office for your San Francisco work.

Q. And the back room of the *Mother Earth* office was therefore originally used for the San Francisco work? A. Yes.

Q. And then do you remember, when we needed an office for the few issues of *The Blast*, do you remember my calling your attention to the fact that it would be difficult for me to transfer my San Francisco stuff, publications and pamphlets, and that therefore it would be well to try to have the office upstairs. A. There was such conversation, yes.

Q. And, therefore, we rented the office upstairs because I had had another little office in the same building for several months? A. That is correct.

Q. Do a good many people come there to the office of *The Blast?* A. A good many people, yes.

Q. People of various kinds and characters? A. The old, the young, detectives, and newspaper men and——

Q. Do detectives come up there? A. Yes.

Q. And newspaper men? A. Yes.

Q. And other business and professional men? A. Yes, all kinds of people.

Q. Workingmen, and all kinds of people? A. Yes, and professional people.

Q. And the same pamphlets, or the same publications, and the same circulars are handed to all? A. Yes, to all.

Q. Handed to them gratis? A. Yes, to all.

Q. The same publications are freely handed to all? A. Certainly.

Q. Even if a detective should happen, for instance, to come up to *The Blast* office, and we would know he was a detective, would he get a copy of the circulars? A. Yes, if he wanted it or asked for it, and maybe, if he didn't have the money, we would give it to him.

Q. Therefore, it makes no difference who comes up? A. No.

Q. It was given out free to whoever asked for it? A. Yes, that is, our circular matter was given out free. We had some books and pamphlets we sold.

Q. Oh, yes, some things were given away free and some were sold? A. Yes.

Q. The more valuable books, for instance, the valuable books were sold? A. Yes.

Q. And circulars, manifestoes, given away free? A. Yes.

Q. How about *The Blast,* the District Attorney wants to know? A. How do you mean?

Q. Was *The Blast* always sold, or always given away free? A. Well, it was done both—it was sold and also given away freely.

Q. *The Blast* was, therefore, sometimes sold, and sometimes given away free? A. Yes.

Q. If a person would come and state they wanted a copy of *The Blast,* and didn't want to pay any money, or couldn't afford it— A. Why, a copy would be given to him.

Q. Copies were given free? A. Yes.

Q. And those people who came up to the office of *The Blast,* were they all known to us? A. No, they were not all known to us.

Q. Some were known and others were not known? A. Some were known and others were not known.

Q. The Harlem River Casino meeting, that was mentioned here, on what date did that take place? A. On the 18th of May.

The Court: In the evening?

The Witness: In the evening of the 18th of May.

Q. 1917? A. 1917.

Q. The meeting was arranged several days previously? A. The meeting was arranged several days previous to the 18th of May.

Q. Was this before or after the Conscription Bill became a law?

Mr. Content: What, the arrangement, or the meeting?

Mr. Berkman: The arrangement.

A. The arrangement was made before the Conscription Bill had been passed.

Q. Before it was passed? A. Why, certainly. I understand the Conscription Bill was passed on the 18th, and the arrangements for the meeting, of course, would have to take place before the 18th.

Mr. Berkman: That is just what I wanted to bring out.

Q. Did the meeting itself take place before the Conscription Bill was passed, so far as you know? A. So far as I know, the meeting took place before the bill was passed. We knew nothing about it until after the meeting was closed.

Q. When you were at that meeting, did you know anything about the bill being passed? A. I did not.

Q. Do you remember that the first news of the Conscription Bill becoming a law did not come out either until very late in the evening on the 18th, or the next morning the papers—when did you first see it in the papers about the Conscription Bill becoming a law? A. As I remember it, it was after the close of the meeting on May 18th, after the meeting had closed, and we got a paper, and there was some conversation among us about

the bill being passed, but we had no knowledge of it then. That is as I remember the incident.

Q. And you were busy about the speeches, and busy preparing for this meeting on May 18th at the Harlem River Casino all that afternoon and evening, being up at the hall, and do you remember that when the speakers and a few friends left that hall about eleven o'clock that night, or late in the evening, that was the first time we heard about the bill becoming a law? A. Yes.

Q. Well, so far as you remember the speeches, in the Harlem River Casino, did they refer to the Conscription Bill or the Conscription Law? A. Well, I did not hear the speeches at the Casino. I was guarding the stage door, to keep the soldiers and sailors off the stage. I can't tell you about the speeches.

Q. You were at the stage entrance? A. Yes.

Q. May I ask whether the mass meeting at the Casino was a peaceful meeting, except for the disturbance of the men in uniform? A. It was a peaceful meeting.

Q. So far as the audience was concerned? A. So far as the audience was concerned, it was an enthusiastic and peaceful meeting. The disturbance was caused by the sailors and soldiers.

Q. Was the meeting on May 18th called with reference to conscription, or with regard to registration? A. It was called to discuss the Conscription Bill that was before Congress.

Q. What name did the mass meeting have—how did you refer to it—how was it called in the hand bill? A. I don't remember, I would have to see the hand bill. I think it was called the protest meeting, no-conscription protest meeting, as I remember.

Mr. Berkman: The no-conscription protest meeting?

Mr. Content: That is your best recollection.

The Witness: Yes.

Q. Do you remember whether it was at any time called the no-registration meeting? A. No.

Mr. Content: We don't claim it was. There was no evidence it was.

The Witness: Oh, no.

Q. The meeting was just called the no-conscription meeting? A. Yes, I could not be exact about its terms, its wording, without seeing the hand bill, but it was a protest against the Conscription Bill, I know that.

Mr. Content: There was no claim on the part of the Government that it was called the no-registration meeting. There was no evidence as to that.

Q. But was the word "registration" in that hand bill? A. The word "registration" never appeared in any of our hand bills.

Mr. Content: Are you sure of that?

Q. On the hand bills, did the word "registration" appear in any of our hand bills, announcing the mass meeting in the Casino? A. No.

The Court: The question is in reference to these hand bills announcing the mass meeting.

Mr. Content: May 18th.

The Witness: May 18th had nothing to do with registration.

Q. That was an out and out no-conscription mass meeting? A. Yes.

Q. And what was the heading of the hand bill?

Mr. Content: She has said she could not remember. That was what she said.

A. As I remember that, it was no-conscription protest meeting, May 18th, that is my best recollection.

The Court: He is cross-examining, and he is doing all right, Mr. Content. Her answer can stand.

Q. Then that was the heading, "No-Conscription Protest Meeting"? A. Yes.

The Court (addressing the jury): We will now suspend until five after two. Before you go, let me say this to you, that I know that in newspaper accounts there frequently something slips in that did not take place in the court room. Of course, I know that such accounts will not influence you; but at the same time, I think it is always better when you are engaged in a trial, not to read the accounts of the trial at all. The other day, in some of the papers, there was a reference to a matter which the Court and the District Attorney had not given any information about, so far as the publication was concerned—that might not in any manner, shape nor form come into the case, but I have always found it a very good rule, not to read the accounts of the trial because we in the court room know exactly what took place. It is not that they would influence us at all, but it is upon the theory and feeling that in a criminal trial, I have the same desire as every other Judge, and that is that the jury shall confine their attention solely to the evidence produced in the court room.

(Recess until 2.05 P. M.)

AFTERNOON SESSION.

(2.05 P. M.)

MARY ELEANOR FITZGERALD resumed.

Cross-examination continued by Mr. Berkman.

Q. Miss Fitzgerald, do you remember the meeting on May 9? A. Yes.

Q. An informal meeting? A. An informal gathering, to plan for a protest meeting against the Conscription Bill, and at that meeting it was decided, at that preliminary meeting, to hold a big meeting on May 18th.

Q. Was it anything unusual to hold such informal gatherings at the offices? A. No, not at all.

Q. Do you remember any little gathering on May 10th? A. Yes, there was a little gathering.

Q. Where was that held? A. That was held, that little gathering, in the office of *Mother Earth*.

Q. What was the purpose of that gathering? A. It was a little farewell meeting or gathering of friends of people that were going to Russia the following Saturday and on the following Monday.

Q. It was a frequent plan to have these gatherings and socials? A. Yes.

Q. At the various offices? A. Yes.

Q. Do you remember the meeting of May 16? A. Yes, on May 16 there was another little meeting to prepare for the large meeting of May 18.

Q. What were the preparations made? A. Well, arranging committees for collections, and the ushers, and the sale of literature, etc.

Q. Was the question of conscription discussed at that meeting? A. Not in the evening.

Q. On May 16? A. On May 16, yes, I think it was.

Q. Was the question of registration discussed at that meeting? A. No, the question of registration was not discussed at the meeting of May 16.

Q. What then was the purpose of that meeting? A. The purpose of the May 16 meeting was to plan our committees for taking care of the May 18th meeting.

Q. The mass meeting? A. The mass meeting of May 18th, at the Harlem River Casino.

Q. Do you remember the committee meeting of May 23rd? A. There was a committee meeting, a small gathering, similar to the one on the 16th, that was held on the 23rd, yes.

Q. Where was that meeting called for? A. The meeting of the 23rd was originally called for to be held at the *Mother Earth* office at 20 East 125th Street.

Q. Where was it held—was it held there? A. No, it was not.

Q. Where was it held? A. It was held in the apartment of Miss Goldman.

Q. What was the reason for the change in the office to Miss Goldman's apartment? A. On account of the injury to your foot.

Q. Was Miss Goldman present at that meeting? A. She was not.

Q. Why was she not present? A. She was lecturing in Springfield, Massachusetts.

Q. Was there any word received from Miss Goldman from Springfield for that meeting? A. Yes, I received a letter from Miss Goldman, and in that letter she——

Mr. Content: I object.

Q. One moment, no, that is enough. You received a letter? A. Yes.

Q. What became of that letter? So far as you know, where is that letter now? A. The District Attorney has it, or the Marshal.

Mr. Berkman: May I ask the District Attorney to produce the letter which was sent by Miss Goldman from Springfield to that

meeting, and confiscated by the District Attorney.

Mr. Content: Mr. Berkman, you know perfectly well that your ex-attorney, who is still somewhat your attorney, Mr. Weinberger, asked me this morning for that letter, and I told him it was not necessary to serve a notice to produce, that when Miss Fitzgerald was finished that the Government, or the special agent, would look through everything to find it. You know perfectly well I have not that letter in my pocket. There is a mass of correspondence I have not touched, and this is not proper cross-examination, and has nothing to do with it.

The Court: As soon as she has finished, she may look through those (indicating).

Mr. Content: They are not in the court, they are in the Marshal's room, and I told Mr. Weinberger——

Mr. Berkman: I don't know everything you told Mr. Weinberger.

Mr. Content: No, naturally. It is convenient to have an attorney sometimes, and sometimes not.

The Court: As soon as she is off the stand, she can go with the man Mr. Content referred to, and go through this series of documents that Mr. Content has referred to, and then she can be placed back on the stand at any time for the purpose of asking her any questions in regard to that matter.

Mr. Content: This is not proper cross-examination, anyhow, as to this.

The Court: I understand that.

Mr. Content: I told Mr. Weinberger that he should be furnished with that, that they have ample time before the defense puts in its case. We have nothing to hide.

Mr. Berkman: I want to state that I had no time to talk with Mr. Weinberger to-day.

The Court: That is all right. You shall have the letter if it is in existence.

Q. At that meeting, the committee meeting of May 23rd, that was to be held at the office, and was held at the apartment, because I could not leave, that no-conscription meeting, was the question of registration discussed? A. It was.

Q. What position did your League take with regard to registration?

Mr. Content: Objected to as not proper cross-examination.

The Court: Sustained.

Mr. Berkman: May we ask what was the purpose of that committee meeting on May 23rd?

Mr. Content: The meeting of May 23rd was not covered by the direct examination at all.

The Court: You may reserve that for the defense.

Mr. Berkman: All right.

The Court: The general line is entirely proper, but in your mode of trying the case, it is a little out of order.

Q. How many issues of *The Blast* have been published in New York?

Mr. Content: That has already been answered, she said May and June.

The Court: May and June, 1917?

The Witness: Two.

Q. Where was the May issue published, what printers? A. The May issue was published by the Graphic Press.

Q. The June issue? A. The June issue by the Grayzel Press.

Q. Can you tell us the reason why the June issue was not published at the same place where the May issue was? A. The Graphic Press had a rush of work, and in order to get *The Blast* out by the first of the month, or the first of June, we had to give it to another printer.

Q. And the Grayzel Press is the same printer that prints the *Mother Earth?* A. Yes.

Q. And that last number of *The Blast,* the June issue, was published there? A. The last issue of *The Blast,* the June issue, was published at the Grayzel Press.

Q. Were copies of *The Blast* given to anyone who would ask for them? A. Copies of *The Blast* given to anyone who asked for them and they were also sold, sent out through the mail and distributed around.

Q. And the same about any circulars issued? A. Yes.

Cross-examination by Miss Goldman.

Q. Have you been reading *Mother Earth* for some time? A. I have been reading *Mother Earth* for about nine years, Miss Goldman.

Q. As a subscriber to *Mother Earth,* have you any knowledge when approximately the magazine was mailed to the subscribers each month? A. Yes, about the first of each month.

Q. Do you think that the June number was—that any exception was made with the June number regarding the date, the first of the month or the 2nd? A. Not at all.

Q. The same as the other magazines? A. Yes.

Q. You have not been in New York very long, but nevertheless, I want to ask you whether you have any knowledge how long *Mother Earth* was published by the Grayzel Press, approximately? A. I should say about, from my knowledge of your work, about five or six years.

Q. Will you be good enough to tell whether there was at any time since Mr. Berkman left New York for California, at any time any connection whatever between *The Blast* and *Mother Earth?* A. None at all, none at all.

Q. Can you state whether the nature of *Mother Earth* is distinct from *The Blast?* A. Well, *Mother* Earth, briefly, I am putting it in my own words, takes up more the educational and the economic, and the philosphy of anarchism and modern thought, while *The Blast* is purely a labor paper.

Q. And as a subscriber to *Mother Earth,* of course, may I ask you, *Mother Earth* is a monthly magazine? A. *Mother Earth* is a monthly magazine.

Q. And *The Blast* is what? A. *The Blast* started as a weekly paper, then on account of lack of funds, it was changed to twice a month, and now it is once a month.

Q. Will you be good enough to state why you were asked occasionally to answer mail addressed to me or to *Mother Earth?* A. Yes, your regular stenographer was ill, and I was on vacation, and as a friend to you, I helped you with some of your correspondence and copying your lectures.

Q. Do you remember from previous times, when you were in New York, before you left for California, whether any changes were made during the summer, regarding the stenographers in the office? A. Yes, I know that. When you were away on your lecture trips, the work of the office was lighter, and so you dispensed with your regular stenographer.

Q. And engaged people to help? A. Yes.

Q. How were they engaged? A. Well, they volunteered their services.

Q. I understand. But they were not on full time? A. No, not on full time.

Q. Then, as occasionally letters had to be answered, in a hurry, is it not true that you were

good enough to volunteer to answer them? A. That is the truth of the situation.

Q. Now, it was brought out in the testimony by the prosecution, and you, as a State witness, stated truthfully, that you received lists of *Mother Earth*, that you took the *Mother Earth* list, and other lists, that you found in the *Mother Earth* office? A. Yes.

Q. For the purpose of mailing the no-conscription literature? A. Yes.

Q. May I ask you whether that was an exceptional thing in the custom of *Mother Earth?* A. Not at all.

Q. Or whether it is not a custom with us that if anybody needs to address people for labor purposes, that they are welcome to the lists of *Mother Earth?* A. Yes, that is true.

Q. And would you remember that among the lists that you received—which seemed somewhat to puzzle the District Attorney—that there was also a list known as the birth control list? A. Yes.

Q. Did you not get a birth control list? A. I did.

Q. I wonder if you remember, as far as you can, how the birth control list happened to come into the *Mother Earth* office? Have you any recollection whether, or how—I mean how did *Mother Earth*—how did the birth control list happen to be among our lists? A. People sent in their names to you who were interested in the subject of birth control, and a list was compiled of those names, as I understand it.

Q. Were these lists used in the birth control campaign? Was that given out definitely, whether the list don't date back to that time? A. No, I can't tell you that.

Q. I think you identified your signature on my checks? A. No.

Miss Goldman: Was that brought out?

Mr. Content: No, I asked if she signed as

attorney-in-fact, and she said she had that power.

Q. I would like it, if you have any recollection at all, to tell the Court, and the gentlemen of the jury, approximately when that attorney was given to you, when I gave you a power of attorney to sign my checks—if you have any recollection. A. I think it was the 14th day of May.

The Court: This year?
The Witness: This year.

Q. Are you sure it was May? A. I meant June. I meant the 14th day of June.

Q. Then, up to that time, you never had power of attorney to sign my checks? A. No.

Q. Or *Mother Earth* checks? A. No, up to that time I never had any power to sign your name.

Q. And there was brought out in testimony regarding the meeting of the 18th of May—now have you any recollection—it was not really brought out, and I think in justice to the Court and to the gentlemen of the jury it should be brought out a little clearer as to the time when the May 18th meeting in the Harlem River Casino took place, and whether or not any one of us, or so far as that is concerned, the people of New York, knew definitely that the Draft Law had already been signed by the President.

Mr. Content: She has answered that fully.

By the Court.

Q. What time that evening did that meeting commence? A. Eight o'clock.

Q. And I gathered from what you said before, that it kept up until about eleven, or something of that sort? A. About half past ten, I think, or eleven.

Q. And Miss Goldman and Mr. Berkman were speaking—I mean they were in the hall all that time, weren't they? A. Yes, from about eight o'clock on.

Q. And I suppose you did not go away right after the meeting closed? A. No, not immediately, no.

Q. What time did you get on the street, about, approximately? I rather understood it was about eleven o'clock? A. Something like that, eleven or a few minutes after.

Q. Did somebody buy some newspapers then? A. Yes, some one of the crowd bought a newspaper.

Q. Now, up to that time, to your knowledge, in your presence, had either of the defendants, while you were with them, seen any newspaper or announcement of the passage of the so-called Selective Draft Bill? A. No, not until afterwards.

Miss Goldman: Thank you.

By Miss Goldman.

Q. May I also ask you here, how did Mr. Berkman and myself leave the hall—I mean how did we go to my apartment? A. You took a taxicab.

Q. And why? A. On account of Mr. Berkman's foot——

Q. Did Mr. Berkman have his injury on the 18th? A. He did.

Miss Goldman: That is all that is necessary.

Q. And whether it was not under very great difficulties that he came to the hall? A. It was.

Q. And also, I ask you, and I think it is apropos, how he left the hall? A. In a taxicab.

Q. Miss Fitzgerald, would you please tell us whether, to your knowledge, *Mother Earth*, or I myself, as the publisher of *Mother Earth*, ever had any dealings with the Graphic Press, so far as you know? A. As far as I know, *Mother Earth* or your-

self never had any dealings with the Graphic Press —as far as I know.

Q. As you were secretary and treasurer of the No-Conscription League, will you be good enough to tell whether you had any knowledge of no-conscription money? A. I have knowledge of it.

Q. Of course, I know that as secretary you have that knowledge, that is why I am asking the question.

Mr. Content: She answered. She said she had.

The Court: Of course. That is perfectly proper. Finish the question.

Q. (Continuing) Whether *Mother Earth* had any relations with the no-conscription money. A. It did not.

Q. About the meeting of which you already answered, regarding the 23rd, the preliminary meeting to June 4, the meeting that took place in Hunt's Point Palace, the testimony was given here regarding a meeting at the Hunt's Point Palace on the 4th of June? A. Yes.

Q. Now, can you remember what the purpose of the meeting was to be on June 4th at the Hunt's Point Palace? A. Well, originally the purpose of the meeting for June 4 was a mothers' no-conscription meeting.

Q. A mothers' no-conscription meeting? A. Yes, and we had planned to have it in Madison Square Garden, and have mothers of sons of conscriptable age speak at that meeting; and then there was a question came up that perhaps the men would think it was for women only, and so it was changed to a no-conscription protest meeting. And then we were not allowed to have Madison Square, after it was promised to us, and I secured the Hunt's Point Palace myself, and made the deposits, and all.

Q. Since the hand bill was offered in evidence, announcing the Hunt's Point Palace meeting, as

far as your recollection goes, will you please say who were the speakers at that meeting? A. At the Hunt's Point Palace?

Q. Yes. A. Leonard Abbott was chairman, Leonora O'Reilly was one of the speakers; Louis Fraina, editor of a paper; Emma Goldman; Alexander Berkman; Peter Kane, a young man; and Mrs. Ballantyne.

Q. Well, it is not important to have all of them, because it will come out in a few minutes anyway. Did all of them speak? A. No.

Q. Can you tell us, please, why all the speakers did not speak that evening? A. The meeting was closed earlier on account of the rioting and trouble that was caused by the soldiers and sailors at that meeting.

Q. Can you also remember—if it is permissible—under the circumstances—the circumstances of my speaking?

Miss Goldman: If that is permissible, your Honor, or we can leave it until later.

Mr. Content: I don't object.

The Court: Well, do it now, it is just as easy as any other time.

A. Well, there was trouble caused by the soldiers and sailors in the gallery. There were a few objects thrown down on the stage, broken light bulbs, and so forth, and the meeting was beginning to be an incipient riot—if I may say it that way—and Miss Goldman sprang to the platform and quieted the people. And even the press said if it had not been for Miss Goldman there would have been a riot, and that all the trouble was caused by the soldiers and sailors, absolutely.

Miss Goldman: I think that is all.

Redirect examination by Mr. Content.

Q. Now, I omitted to ask just a couple of questions on the direct examination. There is no question that you did help Miss Goldman in her stenographic work? A. I helped, as I said to you before the Grand Jury, I helped her as a friend, I helped her out with her correspondence.

Q. You were asked this question on the Grand Jury, weren't you: "Q. You are an associate editor of *The Blast?*" And your answered, "A. And I help Miss Goldman in her stenographic work." You made that answer to that question? A. Not altogether, I did not.

Q. Will you say I am reading this just as you answered that question? I asked you this question: "You are an associate editor of *The Blast?*" and you answered, "And I help Miss Goldman in her stenographic work." So that you volunteered that, and I did not lead you? A. I don't remember answering in that way. I mean the truth of the matter is as I have stated; and I am not associated with her, except as a friend, and I help her in her work. That is so.

Q. In other words, you were not employed by her as stenographer? A. No, sir.

Q. But you are a stenographer by profession, a shorthand reporter? A. I am.

Q. I think you said to the Grand Jury that you were also a bookkeeper? A. Yes, I am.

Q. Will you be good enough to tell me how you were paid for the work you did for the No-Conscription League or *The Blast?* A. I never was paid any work for the No-Conscription League, no salaries. No one has been paid for the work done in the No-Conscription League. It is all done voluntarily. If you can understand a group of people working together for a thing that they believe in, and that they love, who will do what is done from the joy of the work, that was true of the work I

did for the No-Conscription League, and they paid me no salary.

Q. And did not you receive, or did not you take something out of the receipts of the No-Conscription League? A. Why, for my expenses, carfare, and things like that.

Q. Personal expenses? A. Something was spent, some money was spent, but not personally, except for expenses like carfare and telegrams, and things like that.

Q. And do you participate in the profits of *The Blast?* A. Well, there are no profits to participate in, Mr. Content.

Q. Didn't you say before the Grand Jury that there was a sort of a division of whatever money you had on hand? A. Well, I said, of course, we have contributions from people interested in the work of *The Blast.* We also have paid subscriptions, our paper is a dollar a year, and we have paid subscriptions. We also have people who are so interested they send contributions, and I told you that when the rent was paid, the printers' bill was paid and if there was something to buy food, then we ate, that is what I said.

Mr. Content: I think that is what you said.

Q. You say there was no connection between *Mother Earth* and *The Blast?* A. There was no connection between *Mother Earth* and *The Blast.* They are absolutely two separate and distinct publications.

Q. Well, I call your attention to this, that the mothers' no-conscription demonstration of June 4th —wasn't that arranged through the channels of *Mother Earth* and *The Blast?* A. No, it was not arranged through them.

Q. I call your attention to this form letter: "Realizing this, we appeal to you for moral and

financial support to enable us to carry on an effective campaign by means of meetings. (A mothers' no-conscription demonstration to take place on the eve of Registration Day, June 4th, has already been arranged.) Manifestoes, and above all, through the channels of *Mother Earth* and *The Blast.*" So that those two publications are referred to in the circular which I show you, Exhibit 4 for Identification. A. Well, *Mother Earth* and *The Blast* each had other articles regarding militarism and conscription, etc., but they were separate and distinct publications, that had nothing to do with each other.

Q. I show you a pamphlet entitled, "Labor and War," and ask whether that was gotten out by the No-Conscription League, or Miss Goldman, or Mr. Berkman?

Mr. Berkman: May the defense take a look at that?

Mr. Content: No.

A. That was not gotten up by the No-Conscription League.

Q. That was not gotten up by the No-Conscription League? A. No.

Q. Did you ever see any of these pamphlets at the headquarters of the No-Conscription League? A. Yes, you got them there, I think.

Q. I say, I asked you did you see any? A. Yes, I have seen the pamphlet.

Q. You say you have seen some around the headquarters of the No-Conscription League? A. Some were sent there. It is usual for different meetings, for organizations, to send their hand bills to all those who are in harmony with the work.

Q. And were you familiar with this proposed meeting of June 23rd—did you know it was to be held on June 23rd, you personally? A. Yes.

Mr. Berkman: The defense admits they called a meeting on June 23rd.

Mr. Content: In Madison Square.

Mr. Berkman: Yes, in Madison Square Garden. The reason I did not speak there was because it was held somewhere else.

Q. But Miss Goldman and Mr. Berkman were scheduled to speak at that meeting of June 23rd? A. They were.

Q. And were some of the hand bills of that meeting given out by the headquarters at 20 East 125th Street? A. I couldn't say whether they were or not. I know some were sent there, and they were on the table when your men came. Your people picked them up and took them out.

Mr. Content: Is Mr. Hagerty in the court? Mr. Hagerty, stand up.

Q. Did you ever see this gentleman in the headquarters of the No-Conscription League? A. Yes, I think I have seen this gentleman.

Q. Do you recall whether or not you gave him a copy of *The Blast* on June 2nd, 1917? A. I don't know whether I gave him a copy on June 2nd. There were several reporters at the office.

Q. That was Saturday? A. At the office on Saturday afternoon, and the June issue had just come from the press; and I gave the reporters copies of *The Blast*.

Q. So that if Mr. Hagerty should say you gave it to him, you would have no reason to doubt it? A. No.

The Court: You say then, if Mr. Hagerty says so, you would not contradict him?

The Witness: No, I do not.

Q. No reason to doubt the man's word? A. No, sir. I couldn't say he was in the office on June 2nd; I know I have seen him, and he has been in the office. If he said June 2nd, I gave it to him, I take his word for it. I gave copies to the reporters that were there that afternoon.

Q. On Saturday afternoon? A. Yes, if he says I did, I take his word for it.

Q. I show you three checks, one of June 12th, one of June 16th, and one of June 18th, signed, the first one by Alexander Berkman, the second one by Alexander Berkman, M. E. Fitzgerald, attorney, and the third the same, Alexander Berkman, by M. E. Fitzgerald, attorney, and ask you did those come from the accounts of Alexander Berkman, about which you previously testified on your direct examination? I mean, did those come from the account in which your no-conscription funds were deposited? A. Well, there was only one account.

Q. Only one Alexander Berkman account? A. Yes.

Q. That was in the Harlem Branch of the Produce Exchange Bank? A. Yes, Produce Exchange Bank, Harlem Branch.

Q. Were those for your expenses, or what do those checks represent? A. The Hotel Brevoort checks.

Q. Were those for your expenses there? A. No, those were for Mr. Berkman.

Q. For Mr. Berkman? A. Those were for Mr. Berkman.

Q. This first check is $46.75, the second $12.95, and the third $17.87. Are you able to state what these three different checks were for? A. Well, for the hotel room.

The Court: What is the answer?

The Witness: The $46.75 was for the Hotel Brevoort; it must be he paid for his room and board. The other two are blank checks, aren't they?

The Court: Checks on blank forms, you mean?

The Witness: These were made on the hotel blank forms. Those were for hotel bills.

Q. Were those for yourself? A. Well, I can't say, one might have been.

Mr. Berkman: May the defense see those checks?

The Court: Yes, show the checks to the defendants. Do you want those marked for identification?

Mr. Content: Yes, after Mr. Berkman has finished with them.

The Witness: I could not say positively until I saw the bills going with them, whether they were hotel bills.

Mr. Content: That is all.

Recross-examination by Mr. Berkman.

Q. What is the reason I was staying in the Brevoort Hotel, so far as you know, if you know? A. Because you were not a resident in New York City, and when you stayed in the city you went to the hotel.

Q. And do you remember my making out checks to pay my bills there? A. I do.

Q. And these checks, can you identify these, or some of them, as some of the checks I paid to the Brevoort Hotel? A. One you wrote yourself. The other two—I paid a bill after you were arrested. There were bills left unpaid at the Brevoort when you were arrested, and those checks correspond to the bills that were left unpaid at the Brevoort when you were arrested, and I paid some of them.

Q. All the bills have been paid by check? A. Yes, I think all the Brevoort Hotel bills were paid by check, yes.

Q. And generally, all the business of *The Blast* was paid by check? A. Yes, except the little bills, something like stamps, and those things, which of course were paid by cash.

Q. But generally the bills were paid by checks? A. Yes.

Q. In what form was money sent to the San Francisco labor unions, was that in the form of check or cash? A. In the form of checks, certified checks.

Q. In certified checks. Now, can you please tell us the bank account of *The Blast,* what does it consist of? A. The bank account of *The Blast* was a bank account in your name, and consists of funds sent to *The Blast* for the purpose of publishing the paper, subscription money, and contributions; and there were labor funds, San Francisco labor fund, and there was a Seattle labor fund, and then the No-Conscription League funds that I endorsed and turned over to expedite matters, to Mr. Berkman's account.

Q. Is there any personal account of mine with *The Blast?* A. No, sir, you have no personal account.

Q. I mean it is in the bank under my personal name? A. Yes.

Q. You said there were how many officers in the No-Conscription League?

The Court: She said two.

Q. Was either of them paid? A. No.

Q. Was anybody paid for doing the work of the No-Conscription League? A. No one was paid for the No-Conscription Work.

Q. How were you, or myself, paid for *The Blast* work? A. Why, when there were certain things needed, and we could have it, we took it from the general funds of *The Blast.*

Q. Did we generally have a note of what, for instance, the expenses for a week or a month were? A. Yes.

Q. And what the necessary expenses would be for the paper itself? A. Yes, what was paid for the paper.

Q. And a note of what the number of subscribers were, and how many already paid for the paper? A. Yes.

Q. The number of subscribers, and how many of them had been paid for, subscribers to the paper? A. Yes.

Q. And the balance, if there was an occasional balance, after the expenses were deducted—were you paid as an employee, or simply as a collaborator? A. No, I was not paid as an employee.

Q. Sharing whatever was left? A. Yes, that is the anarchistic idea.

Q. In other words, we carried out our principles in regard to mutually sharing whatever there was left? A. Yes, we did. I would like to say this, that speaking of the personal account, I did some work for my own account. I did work for the Lyceum, and the Chatauqua, to make a little money for my own expenses, so I had some funds outside of *The Blast*, for that work.

(The check of June 12, 1917, marked Government's Exhibit 20 for Identification.)

(The check of June 16, was marked Government's Exhibit No. 21 for Identification.)

(The check of June 18, was marked Government's Exhibit No. 22 for Identification.)

GEORGE W. BURNHAM, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your occupation? A. Real estate, with Barnett & Company.

Q. Are they real estate brokers? A. Yes.

Q. Where is your place of business? A. 11 East 125th Street.

Q. Were they the brokers or agents for 20 East 125th Street? A. They were the agents.

Q. Do you collect the rents? A. I do, a portion of them.

Q. Do you collect the rents for 20 East 125th Street? A. Yes.

Q. Do you know the defendant, Emma Goldman? A. Yes.

Q. How long have you known Miss Goldman, approximately? A. About a year, probably two years.

Q. Do you know Alexander Berkman? A. No, I have never met him.

Q. You saw him in court. Had you ever seen him before? A. Not that I recall.

Q. To your knowledge? A. Not that I remember.

Q. But you have seen Miss Goldman during the last year, at least? A. Yes.

Q. Now, will you take the second floor of the premises at 20 East 125th Street, one flight up, and tell me by whom those premises are occupied? A. Emma Goldman.

Q. Is she the tenant for that second floor? A. The second floor.

Q. Have you a lease with her? A. No.

Q. What is the arrangement between yourself and Emma Goldman? A. Monthly rental.

Q. So that she is a tenant from month to month —is that correct, as it is called? A. Yes.

Q. How long has she been such a tenant, from month to month, on the second floor of these premises at 20 East 125th Street? A. Two or three years.

Q. Have you collected rents from Miss Goldman here, yourself? A. I have, on several occasions.

Q. You have never, however, met Mr. Berkman? A. No, I never met him.

Q. Will you please tell me whether Miss Goldman occupies the whole second floor? A. She rents the whole second floor.

Q. As a tenant, from month to month? A. Yes.

Q. And at what rental? Do you recall the monthly rental? A. Twenty dollars.

Q. Twenty dollars per month? A. Yes.

Q. Will you tell me who are the tenants of the third floor of the same building? A. Well, the tenant for the third floor, front hallroom, is an old man who has always lived there, his name is J. Michaels.

Q. What is his business? A. He manufactures, I believe sells novelties.

Q. So far as you know, he has nothing to do with Miss Goldman? A. Oh, no.

Q. Who else? A. In the rear room, a party named Kelly. I don't know who he is, because I have never had contact with him.

Q. How long has Kelly been there? A. About three months, I understand.

Q. Prior to Kelly, who was the tenant of the same premises? A. Kerr.

Q. Now, did you ever rent any part of the second floor to Miss Goldman or Mr. Berkman? A. No, the third floor.

The Court: You mean the third floor.
Mr. Content: Yes, the third floor.
The Witness: No, sir.

Q. And so far as you know, only Miss Goldman is the tenant of the second floor of that building? A. Yes.

Q. And that is all she paid rent to you for, the second floor, for which she pays $20 a month? A. Yes.

Mr. Content: That is all.

Cross-examination by Miss Goldman.

Q. Will you be good enough to tell the Court whether you can remember just about how long I have the office from your firm, for *Mother Earth?* A. I could not say, Miss Goldman, because I had nothing to do with it beyond about a year ago—I think it was a year ago.

Q. I see. So that you really were not the gentleman who rented the office to me? A. No, ma'am.

Q. You said you sometimes collected the rents? A. Yes.

Q. Why don't you always collect the rents? A. Well, because sometimes a check was sent by mail, and it was not necessary.

Q. You said that a gentleman by the name of Mr. Kerr had rented the upper rear room of the floor? A. Yes.

Q. Have you any knowledge how long he had the room? A. No, I never had anything to do with that party, because I believe it was always paid by mail.

Q. You have no knowledge about how long he has been there? A. No.

Q. And you have, of course, no knowledge how long ago Mr. Kelly took the room over from Mr. Kerr? A. I think it was about three months ago. I won't be positive. That was the first I heard of it.

Q. Then, so far as you know, I was in charge of the second floor all the time? A. As far as I know.

Q. But you can't remember how long ago it was? A. No, I can't.

Q. It will be three years this October? A. Well, I should judge it was about that time.

Mr. Content: If Miss Goldman says she has been that long, I will concede it.

Q. Now, as far as you know, did your firm ever, do you remember, have trouble with either myself as a tenant, or with *The Blast?* A. Well, I couldn't say we ever had any trouble. There was once a little objection to a sign that was out, but when we spoke to you about it, you removed it shortly afterwards.

Q. But otherwise everything went along smoothly, without any difficulty? A. No difficulties at all.

Miss Goldman: That is all.

Redirect examination by Mr. Content.

Q. Was Miss Goldman a tenant there during May and June of this year? A. Yes.

Cross-examination by Mr. Berkman.

Q. Were you always in the office, Mr. Burnham? A. Not always, I have been for the last year in most of the time.

Q. Well, during the day are you there all the time? A. Most all the time.

Q. Wouldn't it be possible for someone to rent an office there from Mr. Barnett without your being present? A. Yes, it would be possible, but I would be notified of it.

Q. Is your memory for faces very good? A. My memory? No, sir. I can't distinguish people in particular.

Q. You don't remember seeing me—I was on crutches then—coming into your office, and you referred me to a gentleman with glasses who was sitting at the table? A. How long ago was that?

Q. About two months ago? A. I don't remember, though I may have.

Q. Do you remember me asking whether the office there was to be vacated by Mr. Kelly, or Mr. Kerr? A. Well, there was a rear office, I believe there was something about that.

Q. And did you remember somebody asking whether the office would be vacant? A. The rear office, yes.

Q. And it was not absolutely necessary for that person to rent it from you, was it? A. No, not from me, but from Barnett & Company.

AUGUSTUS J. DOYLE, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Are you an employee of the New York Telephone Company? A. Yes.

Q. And their main office is on Dey Street, New York? A. 15 Dey Street.

Q. What is your occupation—I mean what is the form of your employment? A. Commercial agent.

Q. Is it part of your duty to attend to contracts for telephone service? A. New applications, yes, sir.

Q. For the installation of telephones? A. Yes.

Q. I show you Government's Exhibit No. 11 for Identification, and ask you whether on the lower left hand corner, that is your signature? A. Yes, that is my signature.

Q. Did you take this application for a new installation? A. Yes.

Q. And was it on the date mentioned there? A. That is the date it was accepted, May 12th.

Q. May 12th, 1917, was the date it was accepted? A. Yes.

Q. And do you know Mr. Berkman personally? A. I just know I took that contract from him.

Q. You took this yourself direct from him, this contract? A. Yes.

Q. Did he sign it in your presence? A. Yes.

Q. This is for a telephone at 20 East 125th Street? A. Yes, I think it was the second floor.

Q. And was the telephone installed? A. It was installed about five or six days later, I think.

Q. Did you have any particular conversation with Mr. Berkman at the time you saw him? A. Well, that he had a splendid article, and asked the service to be rushed, and I think we made a special effort to get there; and I got a copy of *The Blast*.

Q. Was that the May or the June issue? A. That was May.

Q. And did he give it to you or did you ask for it? A. Why, I can't recall now, but I might have asked for it. I generally do, to see what it is they publish.

Q. But do you remember what he stated his business to be at that time? A. No, I can't recall that.

Q. How did you know it was a publication? A. Because he asked for listing for *The Blast,* and I asked what it was.

Q. He asked to have *The Blast* listed in the telephone book? A. Yes, sir; and I asked what it was, and he said it was a magazine that they were just publishing, and I asked him has he a copy of it, and he gave it to me.

Q. That was in May, however? A. That was the first week in May, the first or second week in May.

Q. So that the application was to have a listing under his own name, and also under the name of *The Blast?* A. No; just under the name of *The Blast.*

Q. And not in his name, Alexander Berkman? A. No, sir; not under his own name.

Mr. Content: I offer this contract in evidence; this is Government's Exhibit 11 for Identification now.

The Court: It is received.

(Marked Government's Exhibit No. 11 in evidence.)

(Government's Exhibit 11 shown to the jury by Mr. Content.)

Q. Now, I ask you if you produced from the files of the New York Telephone Company, a contract of the subscriber Emma Goldman? A. Yes, that is our regular contract form, as taken out of the contract files.

Q. Taken from your contract files? A. Yes.

Q. I show you Government's Exhibit 12, and ask you is that part of the contract that was produced from your files? A. That is the supplemental contract to the original.

Q. Which is the original? A. The bottom one there (indicating).

Q. That was January 24, 1912? A. Yes.

Q. It is signed Alexander Berkman, if you want to look at it.

Mr. Content: Mr. Berkman concedes that on the original contract of January 24, 1912, his signature is affixed.

Miss Goldman: At that time I believe I was at 55 West 28th Street, New York City.

Mr. Content: Will you concede this was renewed then?

Miss Goldman: Yes.

Mr. Content: Then I will not offer it in evidence.

Mr. Berkman: Miss Goldman concedes the contract was renewed from time to time.

Miss Goldman: Perhaps it needs this little explanation: You see at that time Mr. Reitman was still in the office of *Mother Earth,* and he signed the original contract. Afterwards I continued to sign it.

The Court: That was in 1912.

Mr. Content: The original.

Miss Goldman: Yes.

Q. But the *Mother Earth* 'phone has always been continued? A. Yes, it has.

Cross-examination by Mr. Berkman.

Q. May I ask you whether *The Blast* 'phone is entirely independent of the *Mother Earth* 'phone, on the floor below? A. Yes; in a different location in the building, yes.

Q. And a different number? A. A different number.

Q. Entirely different. And do you remember that I asked you to list me as *The Blast,* in the name of the publication? A. Yes, I do.

The Court: He said that.

Q. Do you remember I asked you wouldn't it be possible to try to put my own name in? A. Your own name?

Q. Yes. A. Why, I don't recall that, but we would list your own name, if you wanted it. I don't recall your asking me that, though.

Q. Do you remember I explained that *The Blast* had moved from San Francisco, a new publication in New York, and was in a hurry? A. I don't know whether you said it was from San Francisco, but I know you said it was a new publication, just starting out.

Q. And that I was anxious to have the 'phone installed so that we could do business? A. Surely.

WALTER POWELL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your occupation? A. Bookkeeper.

Q. What concern do you work for? A. Walker Engraving Company.

Q. What is their business? A. Photographic engraving.

Q. Do you make electrotypes? A. No.

Q. What do you make, wood cuts? A. We reproduce copies on copper, for our printing office.

Q. Do you know Alexander Berkman? A. By sight, only.

Q. I mean you recognize him there now? A. Yes.

Q. Do you know Miss Emma Goldman? A. No, sir.

Q. Not even by sight? A. No, sir.

Q. You are the bookkeeper for this Walker Engraving Company? A. Yes.

Q. Where is their business? A. 141 East 25th Street.

Q. Is that a corporation? A. A copartnership

Q. Who are the copartners? A. Henry L. Walker and David Epstein.

Q. During the month of May, 1917, do you recall whether the Walker Engraving Company did any work for Alexander Berkman? A. Yes, three orders.

Q. I show you a copy of a cut, "Conscientious Objector", and bearing on it at the bottom the word "Conscription", and I ask you whether that is a copy of a cut made by your concern? A. It is.

Q. And do you recall by whom the order for this engraving contract was given? A. Alexander Berkman.

Q. Then you proceeded to make the cut in accordance with the drawing given to you? A. Yes.

Q. And after the cut was ready, what did you do with the cut—you may use this (indicating) to refresh your recollection? A. The plate was delivered to the Graphic Press.

Q. Did you take the receipt of the Graphic Press for it? A. We did.

Q. What was done with the copy? A. The copy of the proof and the plate was sent to Alexander Berkman.

Mr. Content: I offer Exhibit No. 13 for Identification in evidence. Mr. Berkman, you have already identified the signature.

The Court: Very well. It is received. Does that show when it was done?

Mr. Content: Yes, it is on that sheet.

Q. This top sheet is in effect a receipt, is it, for that? A. That is right.

Q. A receipt for the cut from the printer and a receipt for a copy of the proof from Mr. Berkman? A. Yes.

(Shown to the jury by Mr. Content.)

Q. Now I show you a large copy of the same cut, and ask you whether you made a large cut from the same drawing? A. We did.

Q. At whose order? A. Alexander Berkman.

Q. And does this refresh your recollection when you sent away, and to whom you delivered the original and a copy? A. The original plate was delivered to the Graphic Press, and the proof and copies were delivered to Alexander Berkman.

Q. What date? A. May 10.

Q. 1917? A. 1917.

Mr. Content: I offer Exhibit No. 14 for Identification in evidence.

(Marked Government's Exhibit No. 14 in evidence.)

Q. Now, Mr. Powell, I show you Government's Exhibit No. 15 for Identification, and ask you whether the copy, June 5, "In Memoriam, American Democracy," whether the cut for this copy was made by your concern? A. It was.

Q. At whose order? A. Alexander Berkman's.

Q. Using this to refresh your recollection, what was said at the time the original was delivered, and at the time the copy and proof were delivered? A. The original plate was delivered to the Grayzel Press and the proof and copies were delivered to the *Mother Earth* publication.

Q. Did you have any personal dealings with the *Mother Earth* publication? A. Not during this time.

Q. Well, all your dealings were with Mr. Berkman? A. Alexander Berkman.

Q. You didn't know Miss Goldman? A. No.

Q. She was a customer of yours? A. No.

By the Court.

Q. Was this delivered to you by Mr. Berkman? A. One of his messengers.

By Mr. Content.

Q. It was brought down by messenger? A. Yes.

Mr. Content: I offer Government's Exhibit No. 15 for Identification in evidence.

(Marked Government's Exhibit No. 15 in evidence.)

(Government's Exhibit 15 shown to the jury by Mr. Content.)

Q. Now, I show you a drawing with a man on the back of a soldier, and the phrase, "Free Russia. Maurice Becker, 1917," and ask you whether that was done by you, whether the cut was made, the cut for this drawing was made by your concern? A. It was.

Q. At whose order? A. Alexander Berkman.

Q. Now, using this to refresh your recollection, will you please state what was done with the original and copy of those cuts? A. The original copy, proofs and plates, were delivered to Alexander Berkman.

Q. So that in this case you did not deliver the cuts to the printer, as in the three previous exhibits? A. No, sir.

Q. The original, the copy and the proof, were—all went to a Mr. Berkman? A. All went to Mr. Berkman.

Q. And was there some order first which was delivered to the printer, which was subsequently cancelled? A. The original order was delivered, with his plates, to the Graphic Press.

Q. And that was cancelled? A. That was cancelled.

Q. And you delivered that to Mr. Berkman, all of it? A. Alexander Berkman.

Q. You did? A. Yes.

Mr. Content: I offer Government's Exhibit 16 for Identification in evidence.

(Marked Government's Exhibit No. 16 in evidence.)

(Government's Exhibit No. 16 shown to the jury by Mr. Content.)

Q. Do you recall whether or not your concern was paid for this work? A. Two of those orders were paid for and two of them were not.

Q. Two of them were paid for and two were not? A. Yes.

Q. Were you paid by check or cash? A. By check.

Q. Do you know by whom the check was signed? A. The signature was Alexander Berkman.

Q. You are the bookkeeper? A. Office manager.

Q. And you would know of the receipt of moneys? A. Yes.

Q. And you handle moneys received and paid, and otherwise? A. Yes.

Q. So that but two have been paid by the check of Alexander Berkman, and the other two are still unpaid? A. Yes.

By the Court.

Q. Which two, Mr. Powell? A. The one delivered on May 31st and the other delivered on June 1st.

By Mr. Content.

Q. Were not paid for? A. No.

Q. Those are the last two I showed you? A. Yes.

Q. So that Government's Exhibit No. 15, and Government's Exhibit No. 16, are the ones that were not paid? A. Both unpaid.

By the Court.

Q. The other two were paid for by the check of Berkman? A. Yes.

Cross-examination by Mr. Berkman.

Q. How long have you been working in that place? A. To my knowledge, seven years.

Q. Is it not a fact that your place is known as one of the best in the City? A. Yes.

Q. Do fine work? A. Yes.

Q. Did you have work for me three or four years ago? A. That I can't say.

Q. I mean off and on for the last seven years? A. Yes.

Q. For six or seven years—about six or seven years ago I used to give you *Mother Earth* work, when I was the editor of *Mother Earth*? A. I don't know for whose account the work was received, whether for *Masses* or *Mother Earth*—I can't distinguish between the two.

Q. And you remember you had no work from me during about two years, while I was absent from New York, during 1915 and 1916? A. I can't recall exactly.

Q. You can't tell? A. No.

Q. Don't you know when I returned to New York, I began giving you orders again? A. Of course, I don't know when you came to New York, or when you went. I only remember the orders.

Q. Do you remember whether my custom was to telephone there to Mr. Epstein that I have an order? A. I think it was, yes.

Q. Have you heard Mr. Epstein talking to me on the 'phone? A. I have.

Q. Receiving orders? A. I have.

Q. And then I would send a boy down with the cut? A. That is right.

MARK EPSTEIN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your occupation? A. With the Graphic Press.

Q. Is that a corporation? A. Yes.

Q. A New York corporation? A. Yes.

Q. Where is its business? A. 53 Cooper Square, New York City.

Q. Are you an officer of the corporation? A. Yes.

Q. Who is the President? A. Mr. Moses Spiegel.

Q. What office do you hold in the corporation? A. Treasurer.

Q. You are one of the officers? A. Yes.

Q. Is that correct? A. Yes.

Q. What is your particular function in the office, I mean what part of the work do you attend to, specially? A. I am in charge, at the head of the pressmen, and also take care of the office.

Q. Do you know Mr. Alexander Berkman? A. Yes.

Q. For how long have you known him? A. Not quite a year.

Q. Have you been employed in the office of the Graphic Press since you knew him? A. Yes.

Q. From the time you first met him you have had your relations at the office of the Graphic Press? A. Yes.

Q. That is, I mean your acquaintance is limited to business relations? A. What?

Q. Never social friends, just business relations? A. No, business relations.

Q. Do you know Miss Emma Goldman? A. I know her by sight. I am not acquainted with her.

Q. Ever have any conversation with her? A. No.

Q. You have spoken with Mr. Berkman? A. Yes.

Q. Has he ever been at your place of business, 53 Cooper Square? A. Yes.

Q. Did you do any work during the months of May and June of this year for the No-Conscription League of No. 20 East 125th Street? A. Yes.

Q. Have you the record to refresh your recollection as to just what exactly you did, what work you did for that league? A. Yes, as per your instructions, I have the journal where I usually enter my orders.

Q. Will you produce it? A. Yes. (Producing same.)

Q. Without looking at that, you cannot tell us the exact dates on which you did work? A. No.

Q. So that would refresh your recollection as to the dates when you did jobs for the No-Conscription League? A. Yes.

Mr. Content: Now, turn to the month of May, 1917. Don't go beyond that.

Q. Will you give us the date of the first piece of work you did in May for the No-Conscription League, or Alexander Berkman, or Emma Goldman? A. On May 10th I printed 15,000 circulars for the No-Conscription League.

Q. Will you look at Government's Exhibit 1 for Identification, and state whether that is the one you refer to as the circular? A. No.

Q. It is not? A. It is not.

Q. Do you know what kind of circulars they were, the order of May 10? A. No, I can't tell you.

Q. What did you call them in your records? A. Manifestoes.

Q. The May 10 circulars were a notice of meeting, something like that? A. I believe it was.

Q. You have no record of them? A. No, sir.

Q. How many, on May 10, did you print, of that circular? A. 15,000.

Q. At whose orders? A. No-Conscription League.

Q. Do you remember how the order first came to your firm? A. Why, I believe it came by telephone, and then the copy was sent down.

Q. And to the best of your belief that was a manuscript for a meeting? A. Yes.

Q. Now, will you turn to your docket, and tell us what the next order was? A. On May 10, 350 tickets.

Q. Presumably for a meeting, I suppose? A. For a meeting.

Q. After that—go ahead. A. May 14.

Q. What was that? A. 7,000 envelopes, No-Conscription League; and 6,000 letterheads.

Q. I show you Government's Exhibit 4 for Identification, and ask you if that letterhead, on which that multigraphing work is written, whether that is the work of the Graphic Press? A. Yes.

Q. How many of these did you print on May 14th? A. Six thousand.

Q. Now, will you please look at this envelope, Government's Exhibit No. 7A for Identification, and state whether that is the envelope that you printed? A. Yes.

Q. That your firm printed for the No-Conscription League? A. Yes.

The Court: 7,000?

The Witness: 7,000.

Q. And six thousand letterheads? A. Yes.

Q. Tell us what appears next on your journal? A. On May 16, 25,000 manifestoes.

Q. Is that what you referred to as the manifesto, Government's Exhibit 1? A. Yes.

Q. And you delivered to Mr. Berkman 25,000 manifestoes? A. On the 16th.

Q. On the 16th of May? A. Yes.

Mr. Content: I offer Exhibit 1 for Identification in evidence.

The Court: Received.

(Marked Government's Exhibit 1 in evidence.)

Mr. Content: I will not read that until the close of this witness's testimony.

Q. Now, give us the next order? A. On May 17, 2,000 circulars.

Q. What were they, do you know? A. I can't tell you.

Q. They were not manifestoes? A. No, all manifestoes were entered as manifestoes.

Q. Now, what comes next? A. On May 23rd, for *The Blast*.

Q. What was that? A. 5,000 letterheads.

Q. Go ahead? A. Also 5,000 for the No-Conscription League.

Q. 5,000 letterheads? A. For *The Blast*, and also for the No-Conscription League, 20,000 subscription blanks.

Q. Do you know whether this letterhead was printed by your firm for *The Blast?* A. Yes.

Q. Is that what you refer to in the testimony? A. Yes.

Q. What date was that given? A. On May 23rd.

Mr. Content: I ask to have these marked for identification.

(Marked Government's Exhibit No. 23 for Identification.)

Q. I show you Government's Exhibit 8-C for Identification, and ask whether those were printed by your firm for the No-Conscription League? A. Yes.

Q. That is what you referred to as the subscription blank? A. Yes.

Mr. Content: That is 8-C for Identification.

Q. What next, Mr. Epstein? A. On the 29th of May.

Q. May 29, 1917? A. For the No-Conscription League, 30,000 circulars.

Q. Do you know whether this exhibit which I show you, this leaflet, which I show you, is the circular to which you refer? A. Well, I printed several, and I can't exactly tell.

Q. This paper was printed by your firm? A. Yes.

Q. That was printed for the No-Conscription League? A. Yes.

Mr. Content: Well, I offer this in evidence. That is the hand bill of the June 4th meeting.

(Marked Government's Exhibit 24 in evidence.)

The Witness: I also printed another the same day, 5,000 subscription blanks.

Q. The same kind that you previously testified about? A. Yes.

Q. You only printed one kind of subscription blanks for them? A. As far as I remember.

Mr. Content: Will the stenographer note that that is similar to 8-B for Identification.

Q. What is the last date you testified about? A. May 29th.

Q. The 29th of June?

The Court: May.

A. Of May.

Q. That is the subscription blank? A. Yes.

Q. Did you do any more work? A. May 31, I sent 3,500 wrappers for magazines.

Q. Were those blank? A. Blank.

Q. Now, you also sell papers, and wrappers, and things of that sort? A. Yes.

Q. So that there was no printing on these wrappers? A. No printing, blank paper.

Q. You just furnshed them to the No-Conscription League? A. No, to *The Blast.*

Q. For whom? A. *The Blast.*

Q. What comes next. That last was May 31. A. That ends up May. On June 4, printed 23 ribbons, printing on silk ribbons.

Q. Printing of committee ribbons? A. Yes.

Q. Was it your recollection that these ribbons had the word "Committee" on? A. Committee, that is all.

Q. After June 4, did you do any other work? A. On June 7, for *The Blast,* 2,000 envelopes.

Q. Were they plain envelopes? A. No, printed, *"The Blast."*

Q. With the name, *"The Blast"* on? A. Yes.

Q. What comes next? A. June 11, 5,000 letterheads.

Q. Were the same type you have previously identified? A. The same.

Q. No-Conscription League letterheads? A. No-Conscription letterheads.

Q. What is next? A. That is all, I think.

Q. So that the last entry was June 11, is that correct? A. Yes.

By Mr. Berkman.

Q. What kind was the June 11 letterhead? A. I believe it was No-Conscription League.

By Mr. Content.

Q. I show you Government's Exhibit 13, and ask you whether that is your signature on the upper part of this receipt? A. Yes.

Q. So that you received that cut for the picture of "Conscientious Objector"? A. I must have received it, because I signed it.

Q. And you recall receiving some sort of a cut

from the Walker Engraving Company? A. I received quite a few cuts from the Walker Engraving Company.

Q. Look at Exhibit 14, and state if you received that? A. I can't recall.

Q. But you previously testified you printed both these different types? A. Yes.

Q. Well, the one is a small engraving, and the other is a larger engraving, or sort of a drawing? A. Sometimes the engraver delivers up the cut, sometimes delivers it to the customer, and it goes with the copy.

Q. Just look and see, isn't that your signature on Government's Exhibit No. 14? A. Yes.

Q. That would show you received it? A. Yes.

Q. So that you have no reason to doubt you received both these cuts from the Walker Engraving Company? A. No, I have no reason to doubt it.

Q. Now, all the printed matter, all written matter, written material, about which you have testified as having been ordered, was that all delivered by you to 20 East 125th Street? A. Yes.

Q. In each instance? A. Yes.

Q. Have you been paid for any of them? A. Yes.

Q. For all of them? A. For all of them.

Q. Do you recall by whom the checks were signed? A. Well, I couldn't tell you exactly.

Q. Do you remember any of them? A. Well, some of them were signed by Berkman, but I could not say they were all signed by him.

Q. But some you are sure of? A. Yes, sir.

Mr. Content: Before Mr. Berkman cross-examines, I would like to read these two exhibits to the jury.

The Court: Very good.

(Read to the jury by Mr. Content.)

Cross-examination by Mr. Berkman.

Q. Mr. Epstein, how long is it since you have received work from me? A. It is about a year, I believe.

Q. You don't know where I was before that? A. Before what.

Q. Before a year ago, I came to you? A. I knew you were in San Francisco.

Q. And since I came to New York, I began giving you work, at your place? A. Yes.

Q. Was the first work I gave you No-Conscription work? A. No.

Q. What was the first work I gave you? A. It was in reference to the San Francisco labor trial.

Q. Was there considerable work? A. Well, it all depends on what you call considerable.

Q. Well, I mean what kind of work, for instance, circulars for mass meetings? A. Posters for mass meetings.

Q. Circulars? A. Some for a ball that was run for that purpose.

Q. For the benefit of the prisoners' appeal? A. Yes, and work of that nature.

Q. Manifestoes in behalf of the San Francisco unions? A. Yes.

Q. Well, I should say rather considerable work, as one indivdual's work goes? A. Yes, considered from my place, I considered it quite some.

Q. Considerable work? A. Yes.

Q. And that was long before—— A. Oh, that was about a year ago.

Q. Well, I mean a whole year before you began receiving any No-Conscription work? A. Yes.

Q. In the last two months you have received No-Conscription work and also *Blast* work? A. Yes.

Q. And the No-Conscription work consisted of circulars and hand bills, you call to mind? A. Yes.

Q. Advertising certain meetings, mass meetings? A. Yes.

Q. Also manifestoes? A. Yes.

Q. Under date of May 10th you had 350 tickets? A. Yes.

Q. What kind of tickets were they? A. If I am not mistaken, they were for a meeting called the, I don't remember how it was, but for the Mooney meeting, connected with San Francisco.

Q. That is the San Francisco matter? A. Yes.

Q. Do you know whether the ticket was in a corrugated little box? A. I think it was.

Q. Sold for the benefit of Tom Mooney? A. I think it was.

Q. For the benefit of Tom Mooney, in San Francisco? A. Yes.

Q. That had absolutely nothing to do with the No-Conscription work? A. No.

Q. How many issues of *The Blast* did you publish? A. One.

Q. What month? A. May.

Q. May issue? A. Yes.

Q. When I transferred the June issue to another printer, what was the reason why, on account of which, we could not get it done on the 1st of June? A. I was too busy and could not turn it out in time.

Q. And therefore I had to transfer it to some other place? A. Yes.

Q. You spoke here about the circular for the Hunt's Point Palace meeting—the hand bill advertising the meeting. Do you remember when I first sent the copy for that meeting, that was for Madison Square Garden? A. Yes, I remember that they were.

Q. You remember setting up proof for that Madison Square Garden meeting? A. Yes.

Q. Do you remember my changing it afterwards, notifying you it was not for Madison Square Garden? A. Yes.

Q. And was for Hunt's Point? A. Yes.

Q. Do you remember the original plan for the meeting, the proof you sent, and I changed it? A. I remember that, about the changing.

Q. You have no copy of that proof? A. No, sir.

Q. You remember the hand bill was ordered for a Mothers' Mass Meeting in Madison Square? A. Yes.

Q. And then you submitted proof? A. Yes.

Q. And I changed the wording from "Mothers' Mass Meeting" in Madison Square, to "No-Conscription Mass Meeting," Hunt's Point Palace? A. Yes.

Q. You mentioned that you made, printed 23 ribbons on June 4? A. Yes.

Q. What kind of ribbons, committee? A. Committee ribbons, just the word "Committee."

Q. That is, to be worn on the arm? A. Yes.

Q. Outside of that simply the committee being known? A. Yes.

Q. What was the wording of this committee, just one word? A. The word "Committee."

Q. The one word "Committee"? A. Yes.

Q. You say you did printing for *The Blast* envelopes and *The Blast* letterheads? A. Yes.

Q. Did you understand the reason to be that the addresses had to be changed from San Francisco to New York? A. Yes.

Q. Now, are you not sure all the checks you received from *The Blast* office which were for No-Conscription work, were signed by me?

The Court: Do you remember whether all the checks were signed by the defendant Berkman.

The Witness: My impression is, most of them were. Whenever I happened to look at the signature, I believe it was Alexander Berkman. Sometimes I did not notice it.

Q. Was I the only other person who dealt with you in regard to printed matter for *The Blast* and the No-Conscription matter? A. Yes, I did not know anyone else.

Q. You don't remember of Miss Goldman ever giving you any order for No-Conscription work? A. I never had any orders from Miss Goldman.

Q. I was the only one that gave orders for that work? A. Yes.

Q. Can you think of any checks for No-Conscription work or *Blast* work, that was signed by anybody else, some other name, not my name? A. No, sir; I can't.

Q. Do you know of your place ever doing any work for *Mother Earth?* A. No.

Q. The only work you ever did so far as we are concerned was *The Blast* and the No-Conscription? A. Yes.

Cross-examination by Miss Goldman.

Q. You said, Mr. Epstein, you knew me only by sight—I believe you said that? A. Yes.

Q. Have you at any time in your recollection received any kind of work from myself, or the *Mother Earth* office? A. No.

Q. You have not, have you, at any time, received orders from me for the No-Conscription League, for any kind of printing? A. No.

Q. Or from anyone from the office of *Mother Earth?* A. No.

Q. And, of course, since you have received no orders, have you received any payments? A. No.

WILLIAM CURTIS DEMOREST, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a member of the bar of the State of New York? A. I am.

Q. But you are not practising now? A. No, sir.

Q. You reside at 18 East 94th Street, New York City? A. Yes.

Q. Where is your place of business? A. 217 Broadway.

Q. I show you Government's Exhibit No. 7 for Identification, 7-A, 7-B, and 7-C, and ask you whether you received them through the mails, at your residence? A. I did.

Mr. Content: I offer those in evidence, Government's Exhibit 7, and the inclosures, 7-A, 7-B and 7-C, in evidence. Any objection?

Mr. Berkman: No.

The Court: They are received.

(Received in evidence as Government's Exhibits 7, 7-A, 7-B, 7-C.)

Q. About the same time, did any other member of your family receive similar literature? A. My maid handed, that same day, to me, exactly similar literature, addressed to my wife, at the same time the Government's exhibit was handed to me, from the same mail.

Q. Did you open this exhibit? A. I did.

Q. And you turned it over to me? A. I did.

Q. And your wife received a similar one in the same mail? A. It seemed to me to be absolutely similar.

Q. And to the best of your recollection it was received at the same time, at your joint residence? A. Yes.

Mr. Content: I will show these exhibits to the jury, and will read the letter later (showing exhibits to jury).

Mr. Berkman: No questions.

SIGMUND KANTROWITZ, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your business? A. Printer.

Q. What is the name of your printing establishment? A. The name is the Grayzel Press, Inc.

Q. Is that a New York corporation? A. Yes.

Q. Are you an officer of the corporation? A. Yes.

Q. What officer? A. Secretary and Treasurer.

Q. Where is your place of business? A. 129 Lafayette Street.

Q. Do you know Alexander Berkman? A. Yes.

Q. Do you know Emma Goldman? A. Yes.

Q. How long have you known Berkman? A. About four years, three years and eight months, or six months.

Q. Has he ever been at your place of business? A. Yes.

Q. How long have you known Miss Emma Goldman? A. About three or three and a half years.

Q. A little less than the time you have known Mr. Berkman? A. About the same time.

Q. Has she ever been to your place of business? A. Yes.

Q. So that you know them both to talk to? A. Yes.

Q. During the month of May or June, of this year, did you perform any work for Alexander Berkman or Emma Goldman, or *The Blast*, or the *Mother Earth*—yes or no? A. Yes, sir.

Q. You performed some work? A. Yes.

Q. Now, using these memoranda, which you have given me, to refresh your recollection, will you tell me what work you did for *The Blast* and for *Mother Earth?* A. Well, it was done nearly about the same time. It came in to the office, the *Mother Earth* came in, the copy came on May 28th, and *The Blast* came in on May 29th.

Q. Well, only give the *Mother Earth* first. A. Yes.

Q. You say the copy of *Mother Earth* came in—A. Came on May 28th.

Q. To your office? A. Yes.

Q. Was that what would be known as the June issue of *Mother Earth?* A. Yes.

Q. Tell us what your records show as to the work performed by you for *Mother Earth*—by the way, let me ask you this: You have been printing *Mother Earth* for some time? A. Yes.

Q. For how long? A. Well, I came in this business, it is three years and eight months, when I came in this business, and the *Mother Earth* was printed already in our office when I first came in.

Q. So that you have been ever since this printing *Mother Earth?* A. Four years or more.

Q. It is a monthly magazine? A. Yes.

Q. And a day or so before the 1st of the month you get the copy? A. Yes.

Q. And that is you got the copy in this case on May 28th, 1917? A. Yes.

Q. For the June issue? A. Yes.

Q. Tell us what your records show as to the typing, or anything of that sort? A. We started to set the linotype machine, started to set with the linotype machines on May 28th, and the last day I have got here is June 4.

Q. You did not deliver all of that at once, then? A. No, sir.

Q. To whom did you deliver that when you finished? A. To the bindery.

Q. The book bindery? A. Yes.

Q. What is the name of the binders? A. Buckley & Wood.

Q. Is it your habit to deliver *Mother Earth* to Buckley & Wood? A. I don't know whether we deliver or the bookbinders send after it.

Q. But, when you are ready to deliver, it goes to them? A. Yes.

Q. Before it goes to *Mother Earth?* A. Yes.

Q. They deliver direct to *Mother Earth?* A. Yes.

Q. You do the printing, and then it goes to Buckley & Wood? A. Yes, and they bind it.

Q. Did you send the printed copies of *Mother Earth,* the June issue, at once to the bookbinder, or did it go at different times? A. We sent part on the 2nd and part on the 4th.

Q. And how many did you send on the 2nd? A. I think one-half. I judge one-half, on the 2nd, and half went on the 4th.

Q. About half. Do you know how many you shipped altogether of the June issue of *Mother Earth?* A. Yes, ten thousand.

Q. Is that more than usual, or less? A. It is more than usual.

Q. In other words, it was more than the May issue, for example? A. Yes, it was more, yes.

Q. Now, will you take your memorandum with reference to *The Blast*, and tell us on what date you received the copy of *The Blast?* A. On May 29th.

Q. Had you ever printed *The Blast* before this June issue? A. No, sir.

Q. Tell us the circumstances under which you agreed to print *The Blast?* A. Well, I came in on May 29th—I don't remember what day it was, Thursday or Friday——

Q. May 29th was Tuesday. A. Tuesday morning, and the foreman told me that he has the copy of *The Blast*, and they want that we should print it, *The Blast*. I knew Mr. Berkman was the editor of *The Blast*, so I was a little bit cross, because I didn't like to do it in a hurry, and it was the last days in the month, and it was a new publication, and a new publication we always want more time.

Q. It was a rush job, you mean? A. But, as soon as I saw it was only eight pages, I didn't care so much about it.

Q. Did you speak to Mr. Berkman about it at all? A. And then someone told me Mr. Berkman would call me up, and he did call me up, and asked me could I have it by the following Saturday, and I told him yes.

Q. By the following Saturday—this was Tuesday? A. Yes.

Q. You mean if you could have it done by the next Saturday? A. Yes.

Q. That would be June 2nd? A. Yes, and I said yes.

Q. Then you got the copy of the 29th. Is it your practice to deliver these *Blasts* also to the same firm of bookbinders, Buckley & Wood? A. Yes.

Q. Tell us what your record shows as to the delivery of *The Blast*, as concerned the bookbinders? A. It shows I took it off my press on the 2nd, and the 2nd was the delivery to the bookbinders.

Q. How many copies did you print? A. 10,000.

Q. In all? A. Yes.

Q. And those were all delivered by you to Buckley & Wood? A. Yes.

Q. Now, Mr. Kantrowitz, I show you Government's Exhibit No. 15, and ask you whether that is the cover of *Mother Earth* for the June issue? A. Yes.

Q. That is "June 5, in Memoriam, American Democracy"? A. Yes.

Q. Had you received a cut in this case from the engraver? A. Well, I don't know who received it, but we printed it.

Q. Well, that is signed, "The Grayzel Press," indicating that there is a receipt for the cut from them? A. Yes.

Q. Grayzel Press, Inc.? A. I don't know who signed it. It is signed, but we printed it. Somebody must have received it.

Q. You must have received the cut from someone? A. Yes.

Q. When the job was completed, you delivered it to Buckley & Wood? A. Yes.

Q. As you have indicated? A. Yes.

Q. I show you a volume of *Mother Earth,* June 1917, No. 4, and ask you is that the June issue of *Mother Earth* that you have printed? A. I know from the cover, I would like to look inside.

Q. Look at it. A. I never saw it before, if possible, I know we printed it.

Q. You printed it, not only the cover? A. Sure we printed it.

Q. And delivered it to the bookbinders in this form? A. Yes.

Q. Now, I show you Government's Exhibit 16, and ask you whether that is the cover of *The Blast,* or rather a copy of the cover? A. I don't know, because I did not see *The Blast.*

Q. You never saw *The Blast?* A. Never saw it.

Q. I show you another *Blast,* June volume—— A. If you show me another of *The Blast,* I admit we printed it, because we had this here, June first, the last issue, was printed.

Q. Look and see, is that your June number? A. I cannot recognize it, but I know we have printed it, having the record here, we printed it.

Q. Can't you tell whether it is the work of your press? A. No.

Q. In no way? A. No, the same thing could be printed somewhere else.

By the Court.

Q. Do you know? A. I know this issue was printed by us.

Q. He is not asking you if you know the words of that document. He just wants to know whether you printed that thing there. A. Well, we printed it.

The Court: That is all he asks you.

By Mr. Content.

Q. You don't remember that work? A. No.

Q. You printed the June issue of *The Blast?* A. I printed it, yes.

Q. And you printed the June issue of *Mother Earth?* A. Yes.

Q. And in each case you delivered the paper to Buckley & Wood, the bookbinders? A. Yes.

Q. Have you been paid for the printing of *Mother Earth?* A. I have an account for *Mother Earth;* I have always had an account for them.

Q. Do you think there is still some money due you for the June issue? A. I think so.

Q. How about *The Blast,* have you been paid? A. *The Blast* is paid; there was only one issue, and that is paid.

Q. Do you remember how much you charged for the 10,000 copies? A. Yes, I think that you have a copy of the bill.

Q. You charged for it and you were paid for it? A. Yes.

Mr. Content: I offer these in evidence, *The Blast* of June 1st, and *Mother Earth* of June 1st. Any objection to the offer?

Mr. Berkman: Not at all.

(Marked in evidence, *Mother Earth* as Government's Exhibit No. 25, the June issue; and *The Blast,* Government's Exhibit No. 26, the June issue.)

Mr. Content: I will not read it to the jury at this time, but I would like to read it later on, reserving my right to do so.

The Court: Very good. You can reserve reading these until you get this formal proof out of the way.

Mr. Content: Yes, I would like to let these witnesses get away.

Cross-examination by Mr. Berkman.

Q. Mr. Kantrowitz, you remember my speaking to you about soon after I brought *The Blast* from

San Francisco, speaking to you about my desire to have it printed by you, because I knew your work, and you remarked to me you didn't like to have it taken from the other printer, the Graphic Press? A. For the last issue, you mean?

Q. Yes. A. Yes, I asked you that, when you called me up, and I was a little bit busy, and then it was on Thursday, and you wanted it on Saturday, so I asked why did you take it from the other printer. Yes, I remember that.

Q. You remember my saying he was so busy he could not get it out on time? A. Yes, that is right.

Q. And do you remember my saying you ought to do it for *The Blast,* because that is the regular day for it to appear, on the 1st of the month? A. Yes.

Q. And after you found it was only eight pages, you consented to get it ready on time? A. Yes.

Cross-examination by Miss Goldman.

Q. Mr. Kantrowitz, can you approximately remember how long *Mother Earth* has been with the Grayzel Press? A. Well, I came on the Grayzel Press in November, 1913, and I knew *Mother Earth* was already in the office. Of course that was in November, 1913, and I don't know how long before.

Mr. Content: How long do you say they were printing it?

Miss Goldman: I think it is about 1913. We began early in 1913.

Mr. Content: It is conceded that Miss Goldman first began printing *Mother Earth* in the early part of 1913.

The Court: Well, the witness said before November, 1913.

Miss Goldman: Yes.

Q. Since you have been with the Grayzel Press, can you remember other occasions, other issues,

when *Mother Earth* appeared in a larger issue—I mean more copies than usual? A. Yes, from time to time it was sometimes, issues have been printed twice. That is to say, it was running some time, and usually it was printed, an issue of 4000, and then 3000 reprinted again, and if I am not mistaken, I think one issue was printed 5000, and 5000 reprinted, but I cannot tell you exactly.

Q. Well, then, the fact that the June number was printed in 10,000 copies, would not have been anything unusual to you? A. No, it did not surprise me.

Miss Goldman: Well, that is what I wanted to know.

Q. And has your firm done other printing for me, other work? A. Booklets, whatever you call it, pamphlets, some pamphlets.

Q. Quite a number? A. A few.

Q. At different times? A. Different times.

Q. Well, when you say a few, Mr. Kantrowitz, do you mean a few of the same kind, or different kinds? A. No, different kinds, different kinds at different times.

The Court: A few at different times, a few different times.

The Witness: Yes, a few different times.

Q. Have you printed anything from *Mother Earth*, or myself, any printing for the No-Conscription League? A. No, not from you.

Q. Nothing at all? A. No, not from you.

Q. Just *Mother Earth* and the pamphlets? A. Yes, the pamphlets was before.

Q. And since you have been doing *Mother Earth,* can you tell the Court and gentlemen of the jury approximately the day when *Mother Earth* comes out, that is, about? A. Yes, I think I have got a card from 1916 to date.

Q. No, I beg your pardon, I mean——

The Court: You mean what time of the month?

The Witness: Yes, just a moment, I got a card from January 1, 1916 (reading). February 2nd, 1916, March 4, 1916—this is all 1916—March 31, May 2nd, June 2nd, June 30th, August 1, September 5th, October 4th, November 2nd, December 1—1917: January 3rd, January 31st, February 28th, April 30th.

The Court: How about May and June?

Mr. Content: April 30th was the May issue, and he has testified to the June issue already.

The Court: Yes.

Q. Then do I assume that there is nothing unusual in the June number coming out on the 2nd of June? A. No, it was always about the same thing.

Q. And as far as you know, those who delivered the magazine, as far as you know, of course the magazine is delivered always to the office of *Mother Earth?* A. It is delivered to the bindery, and it goes from our place to the bindery.

Q. You were not with the Grayzel Press when your firm did the binding? A. Yes, I was, and then we sold the bindery. I don't know how it is now, we sold it two years ago, and I don't remember, but our bindery used to do the delivery of everything.

Q. To *Mother Earth?* A. To the *Mother Earth,* yes.

EDWARD C. WOOD, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your business? A. I am a pamphlet binder, pamphlets and periodicals.

Q. What is the name of your bindery? A. Buckley & Wood Company.

Q. A corporation? A. Yes.

Q. A New York corporation? A. Yes.

Q. Are you an officer? A. I am.

Q. What officer? A. President and director.

Q. Where is your place of business? A. 17 to 27 Vandewater Street.

Q. Do you know Emma Goldman? A. Yes.

Q. How long have you known her? A. Ten or twelve years, I think, and probably a little longer.

Q. Do you know Alexander Berkman? A. I do.

Q. How long have you known him? A. A lesser time, some four or five years, probably, or longer.

Q. Have you been the binder of a pamphlet or books known as *Mother Earth?* A. I have.

Q. And for how long has your concern been doing the binding of that monthly publication, *Mother Earth?* A. The binding, a lesser time, probably two or three years.

Q. Without going into that, let me ask you if you bound the June issue of *Mother Earth*—a sample of which I hand you, in Government's Exhibit No. 25? A. We did.

Q. And that was a regular monthly affair of yours, to bind the issue of *Mother Earth?* A. It was.

Q. After you bound it, did you deliver that June issue, some of them, Government's Exhibit 25? A. Some of them.

Q. Have you any record showing just in what parcels deliveries were made, and on what dates? A. I have.

Q. Will you give us the record of the deliveries of *Mother Earth?* A. I have a memorandum here.

Q. Yes, use that to refresh your recollection. A. I delivered on June 2nd, 500 copies.

Q. Of *Mother Earth?* A. Of *Mother Earth.* June 4th, 1500 copies; June 7, 200 copies; June 7, 500 copies; June 11, 500 copies; June 13, 400 copies.

Q. Have you receipts for the deliveries, Mr. Wood? A. I have, in my hand (handing same to Mr. Content).

Q. That is to the *Mother Earth* office? A. Yes.

Mr. Content: Miss Goldman, we would like to offer these, I would like to offer them in evidence if they are all right (indicating).

Q. Now, Mr. Wood, did you also do the binding of the June issue of the publication known as *The Blast?* A. I did.

Q. Was it similar to Government's Exhibit No. 26, which I show you? A. Yes, it was.

Q. At whose request did you do the binding of *The Blast?* A. It came on the order, came from the *Mother Earth* office.

Q. Had you ever bound *The Blast* before? A. No, sir.

Q. Had you ever had anything to do with the publication before? A. No, sir.

Q. So that the June issue was the first one—before we go any further, may I ask whether in the case of *Mother Earth* you received the printed copy to bind from the Grayzel Press? A. Yes, sir.

Q. Was that also true of *The Blast?* A. It was.

Q. That also came from the Grayzel Press? A. Yes.

Q. Have you a record of the deliveries of *The Blast?* A. I have.

Q. Will you give us the dates? A. On June 2nd we delivered 5040 copies, one June 11 we delivered 500 copies.

Q. Is that all? A. We have some on hand.

Q. You still have some on hand? A. Yes.

Q. How many are left, do you know? A. 4500.

Q. That makes it 10,000 in all? A. 10,040.

Mr. Content: I offer these receipts in evidence, in one number, the receipts of *Mother Earth,* showing the delvery of *Mother Earth.*

The Court: Very well.

Mr. Content: Give them one number, bound up together.

(Received in evidence as Government's Exhibit 27, being the receipts of the delivery of *Mother Earth.*)

Mr. Content: I also offer in evidence the receipts of the delivery of *The Blast.*

The Court: That will be No. 28.

(Marked in evidence as Government's Exhibit No. 28.)

Q. Have you any *Mother Earths* on hand, or have they all been delivered? A. I believe we have.

Q. Have you received payment for *The Blast?* A. We have.

Q. In full? A. I can't tell you. We have an open account.

Q. Have you received some payment on account? A. Yes.

Q. How about *Mother Earth,* the June issue? A. The same, we have an open account.

Q. Now, do you recall what truckman delivered the 500 *Mother Earths,* and the 5040 *Blasts,* which your receipts show to have been delivered on June 2nd, 1917? A. We have a hired truckman, I think his name is Monahan.

Cross-examination by Miss Goldman.

Q. You said you have known me about twelve years? A. Yes, I did.

Q. How long have you been handling *Mother Earth*—how long have you been in charge of *Mother*

Earth? A. We have handled it all that time, since I have known you.

Q. And as to the binding, you have—— A. Done that part of the time.

Q. Have you ever before had any difficulties whatever in your business transactions with *Mother Earth* or myself? A. I never had any difficulties.

Q. Have you ever had any difficulties in regard to *Mother Earth,* with the Government? A. Never.

Q. Have you ever done any other kind of work for *Mother Earth,* or myself, than the binding? A. I think we have had—there were pamphlets came through our office, some I think came from you, but I have not seen them myself. We have bound some.

By Mr. Content.

Q. Did you also send a mailing list of *Mother Earth?* A. Yes.

Q. You took charge of the mailing list of *Mother Earth?* A. Yes.

Q. To the subscribers? A. We did.

Cross-examination by Mr. Berkman.

Q. You said you received your order for *The Blast* from the *Mother Earth* office? A. To the best of my knowledge.

Q. How do you mean, by the *Mother Earth* office? Was it reported to you? Who telephoned about it? A. The work came in the usual way, and I suppose it came from the *Mother Earth* office. I wouldn't say positively about it, that it did, other than that the order did, but it naturally would; that was all.

Q. Was it reported to you that I myself telephoned to you, and that you were absent, and that I spoke about a new paper? A. I have no information on that.

Q. When you first heard you had *The Blast,* when you first received the order for printing *The Blast,* after it was accepted by your employees, did they report to you that Mr. Berkman telephoned about

the paper? A. I have no recollection of any report to me of that kind.

Q. They simply took charge—I don't know the name of the young woman who answers the 'phone, but I spoke to a young woman, on the 'phone, and then some other young man, evidently who has charge of the binding there, said they couldn't, because they were too busy, and finally they agreed to do the job. Now, when the job was accepted, you understood it was *The Blast,* not *Mother Earth,* that it was a new job? A. Well, the employees did. I don't think they reported the matter to me. My first recollection of *The Blast* was that I saw some of the copies lying there.

Q. Well, do you know the receipts, the signatures to the receipts for *The Blast,* are signed by Miss Fitzgerald, in *Mother Earth,* the receipts for *The Blast,* while the receipts for *Mother Earth* are signed by other names? A. I have observed that in the receipts, Mr. Berkman.

By Miss Goldman.

Q. I just wanted to ask, having had payment, you received the checks from the *Mother Earth*—can you recall how they were signed, I mean by whom? A. I think, I don't really, I think they were signed by yourself; that is my recollection of it.

JEREMIAH J. MONAHAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your business? A. Truckman.

Q. Where is your place of business? A. 396 New Bowery.

Q. You work for Buckley & Wood? A. Yes.

Q. On the 2nd day of June, 1917, did you make any deliveries to 20 East 125th Street? A. Yes.

Q. Do you know what day of the week that was? A. Saturday afternoon, about three o'clock, I believe.

Q. Where did you get the material for delivery? A. Buckley & Wood's bindery, in Vandewater Street.

Q. Where did you deliver that to? A. West 125th Street; the exact number I can't say.

The Court: You mean East 125th Street.

Q. East 125th Street? A. East 125th Street——

Q. What was the name of the addressee? A. The exact number I can't say.

Q. Well, the name to whom you were to deliver it? A. Emma Goldman, I believe, was on the receipt.

Q. Have you got the receipt with you? A. No, sir; I return that to Buckley & Wood.

Q. Who did you see up there; do you recall? A. Miss Goldman, as I recognize in court here, and a young lady who was on the stand, I believe.

Mr. Content: Stand up, Miss Fitzgerald.

Q. Did you see this young lady? A. She signed the receipt.

Q. Was she there at the time? A. I think she signed the receipt, if that is her name.

Q. You think she signed the receipt? A. Yes.

Q. I show you a receipt for 5040 copies of *The Blast*, Government's Exhibit No. 28, signed "M. E. Fitzgerald," and as you—does that refresh your recollection as to who signed the receipt? A. I just said that.

Q. Did Miss Fitzgerald? A. Yes; she signed it.

Q. Did you see Miss Goldman there at that time? A. I think Miss Goldman handed the receipt over to Miss Fitzgerald, if I recall right.

Q. And you think Miss Goldman handed that to Miss Fitzgerald, and that is Miss Fitzgerald's signature on that document? A. Yes.

Q. I show you another receipt, June 2nd, 500, a package of *Mother Earth,* that is also signed by M. E. Fitzgerald. And was the same thing true as to this as to the larger bundle? A. Yes, sir; I had two different sized bundles. Which it was, I couldn't say.

Q. I know, but there were two different sized bundles, and the same procedure was adopted in each case? A. Yes; I judge she handed both receipts to Miss Fitzgerald.

Q. That is your recollection, that Miss Goldman handed both to Miss Fitzgerald, and Miss Fitzgerald signed them and handed them back to you? A. Yes.

Cross-examination by Mr. Berkman.

Q. Do you remember whether you saw me in the office? A. No, sir; I did not.

By Miss Goldman.

Q. Are you very sure you saw me in the office of *Mother Earth?* A. I am almost positive I did.

Q. And do I understand you to say when you brought the package of *Mother Earth*— A. I brought two up at first, and I asked for some help, and you called several young men down from upstairs, and told them to help carry them up, and I brought up two, and they told me not to carry any more, to let them carry up the balance.

Q. And the signature—I did not quite catch your answer—Miss Fitzgerald signed for them? A. Yes.

Q. Where are those slips? A. I turned them over to Buckley & Wood.

Mr. Content: They have already been offered. One was Government's Exhibit 27 and the other Government's Exhibit 28.

HUBERT MOTZ, a witness called on behalf of the Government, was first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are managing director of the Harlem River Park Company? A. Yes.

Q. Is that a corporation? A. Yes.

Q. Is it the owner of the Harlem River Park and Casino? A. Yes.

Q. Where is the Harlem River Park and Casino situated? A. On 127th Street and Second Avenue.

Q. On the 18th day of May, 1917, on that evening, was a public meeting held at that place? A. Yes.

Q. Do you know who made the arrangements for the renting of the auditorium or ballroom? A. Mr. Berkman.

Q. Alexander Berkman? A. Yes.

Q. Did you receive a contract from Mr. Berkman? A. Yes.

Q. I show you Government's Exhibit 2, and ask you whether that is a contract which Mr. Berkman signed? A. Yes.

Q. Did you receive from him a first deposit payment of ten dollars? A. Yes.

Q. When was the balance paid? A. On the 18th of May, before the meeting started.

Q. Before the meeting started up, on the same evening? A. Yes.

Q. A balance of forty dollars was paid? A. Yes.

Q. And by whom was that paid; do you remember? A. By Miss Fitzgerald.

Q. Was that a check or cash? A. By check.

Q. Do you remember now by whom the check was signed? A. I think Mr. Berkman.

Q. By Alexander Berkman? A. Yes.

Q. That is your best recollection? A. Yes.

Q. Did you, upon receipt of the final payment of $40, signed this receipt, marked Government's Exhibit No. 3? A. Yes.

Q. Is that your signature (indicating)? A. Yes.

Q. And did you give it to Miss Fitzgerald? A. Yes.

Q. And the meeting was held on that evening? A. Yes.

Q. Did you see Miss Goldman on that evening? A. Yes.

Q. And Mr. Berkman? A. Yes.

Q. They were both there? A. Yes.

Cross-examination by Mr. Berkman.

Q. You saw me before I made the contract for that meeting on May 18th. Did you see me before that? A. Yes.

Q. What was the occasion on which you saw me? A. Why, you asked if I had the hall open for the night for a mass meeting, either for the 8th or 9th, I think.

Q. I came over to you? A. To my office.

Q. Several days before the mass meeting? A. Yes.

Q. And I asked for the hall? A. Yes.

Q. Did I understand you clearly the purpose of the meeting? A. Yes.

Q. And did I tell you it was a no-conscription meeting? A. Yes.

Q. Did I tell you it was a no-registration meeting? A. No, sir.

Mr. Content: There is no testimony that he did.

The Court: As long as he is here, he might as well ask him.

Q. I took pains to explain to you it was a no-conscription meeting? A. Yes.

Q. And took pains to tell you who would be the speakers? A. Yes.

Q. And was I entirely frank about the matter? A. Yes.

Q. And gave my name as the name of a speaker? A. Yes.

Q. And Miss Goldman's name as a speaker? A. Yes.

Q. And various other men? A. Yes.

Q. Do you remember my asking you do you think the police would stop the meeting? A. I told you I would ask the police.

Mr. Content: What?

The Witness: I told Mr. Berkman to go home, and I will ask the police.

Mr. Content: That is, if you could hold the meeting?

The Witness: Yes.

Q. Did I say that was satisfactory to me? A. Yes.

Q. And I would return; that you should ask the police and explain the character of the meeting? A. Yes.

Q. Say who the speakers would be? A. Yes.

Q. As given by me? A. Yes.

Q. And return and let me know their decision? A. Yes.

Q. And about a day later I telephoned to you, and you did not give me a final decision on it because you could not reach the proper authorities? A. Yes.

Q. And I telephoned to you several times, explaining that we must prepare the hand bills for advertising the meeting? A. Yes.

Q. And what did you say to me finally, Mr. Motz? A. I said—I signed the contract—I said it is all right, and I signed the contract.

Q. You told me it is all right to go ahead with the advertising? A. Yes.

Q. And then I came over to you? A. Yes.

Q. And gave a deposit, and signed the contract? A. Yes.

Q. And it was understood everything is all right? A. Yes.

Q. Now, tell us what was the character of the meeting; was it a nice, orderly meeting, so far as my audience was concerned? A. It was a very peaceful—it was a peaceful meeting.

Q. Was there a little disturbance there? A. Well, some soldiers tried to make some disturbance, but they were stopped.

THOMAS J. MCGEE, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a special agent of the Department of Justice? A. Yes; that is right.

Q. How long have you been such? A. About three years.

Q. Were you present at No. 20 East 125th Street on the day that Alexander Berkman and Emma Goldman were arrested? A. I was.

Q. What date was that; do you recall? A. June 15, I think.

Q. What day of the week was that? A. I think it was a Thursday.

Q. And they were arrested at 20 East 125th Street? A. Yes.

Q. Friday, June 15, 1917? A. Yes.

Q. They were arrested at 20 East 125th Street? A. Yes.

Q. In the afternoon? A. Yes; in the afternoon.

Q. Was the United States Marshal, Mr. McCarthy, down there at the time? A. He was.

Q. Did he perform the arrest? A. He did.

Q. Were you there at the time? A. I was.

Q. Who entered the premises first? A. I think the Marshal.

Q. How close to the Marshal were you in entering? A. Well, there were three of these people intervened; several of these Deputy Marshals were along with him, and I was right behind.

The Court: You entered practically at the same time?

The Witness: Yes.

Q. All in one party? A. Yes.

Q. And Detective Sergeant Barnitz? A. Yes.

Q. And any other special agents? A. Mr. Matthews showed up a short time later.

Q. He did not actually enter at the time the others did? A. No, sir; he did not.

Q. And there were several Deputy Marshals with Marshal McCarthy? A. Yes.

Q. On what floor was Miss Goldman then? A. I guess it would be called the second floor, the first floor above the street.

Q. Who else was on that floor at the time you entered? A. There was a young man whom Marshal McCarthy placed under arrest.

Q. What was his name? A. Bales, I think it was.

Q. Anyone else? A. There was another young gentleman, a young fellow, I don't know what his name was, but he was permitted to go on his way, and requested to step aside while the Government agents performed their duty.

Q. Where was Mr. Berkman? A. He was upstairs, I think it was, I believe the top floor, the third floor.

Q. Did you go up? A. Yes.

Q. Were you there when he was arrested? A. I don't know whether I went up just as he was placed under arrest, but I went in there very shortly after he was.

Q. Who else was in the place? A. I think one representative of the District Attorney's office.

Q. Who; Mr. Stanton? A. Mr. Stanton

Q. Did you see Miss Fitzgerald at that time? A. I saw Miss Fitzgerald—I think she was in Mr. Berkman's office.

Q. Now, did you have any conversation with either of the defendants, yourself? A. Not any conversation.

Q. At that time did the Marshal, at the time of making the arrests, remove various documents and publications? A. He instructed that they be removed.

Q. And did you—were you present while they were being gathered up? A. I was.

Q. Did you stay with Detective Sergeant Barnitz? A. I did. As a matter of fact, the Marshal instructed I should, to see that the Government's side was protected in every way.

Q. You were there representing the Department of Justice? A. That is right.

Q. Speaking of—I will not note now what was taken out, but you were present when Detective Sergeant Barnitz was gathering whatever he subsequently put together and removed? A. Yes.

Q. Was there anything else that happened at that time, other than the performing of the arrest and the taking of the various publications and documents that were found there? A. With the exception of that check for deposit.

Q. What was that? A. On the Harlem Branch of the New York Produce Exchange.

Q. There was a certain deposit? A. Made out in the name of Emma Goldman, dated June 14, for $2100, that Miss Fitzgerald had in her possession.

Q. You did not take it away from her? A. Oh, I did not; no, sir.

Q. That is all? A. Yes; that is all, with the exception of the bank books, and so forth, we found lying there, that we sent down to the Post Office Building.

Q. Well, the things were taken in a lump, and identified by Sergeant Barnitz? A. Yes.

Q. But you were there while they were being gathered by the representatives of the Department of Justice? A. Absolutely.

Mr. Berkman: No questions.

(Adjourned to July 3, 1917, at 10.30 A. M.)

New York, July 3, 1917, 10.30 A. M.

Trial resumed pursuant to adjournment.

Present:

The Court, counsel and jury, same as before.

LELAND C. SPEERS, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a reporter on the *New York Times?* A. Yes.

Q. Were you such reporter during the months of May and June of this year? A. Yes.

Q. I show you Government's Exhibit No. 8 for Identification, 8-B, 8-A and 8-C, and ask you whether or not you can state whether or not that was received by the city editor of the *New York Times* through the mails? A. Yes.

Q. How can you identify that, so far as the fact is concerned that it was received at the *Times* office? A. Well, by the address on it, and by reading the *Times* stamp.

Q. That is the *Times* stamp, showing it was received on the 31st day of May, in the afternoon—is that right—P. M., at 1.30 P. M.; is that what the arrow points to?

Mr. Berkman: The defense concedes sending these letters.

The Witness: I don't know exactly what that means, 1.30; something like that.

Q. It was delivered between one and two P. M.? A. Yes.

The Court: Fix the date, if you will.

Q. On May 31, 1917? A. Yes.

Q. And it was referred to the city editor—referred by the city editor to you? A. The assistant city editor.

Q. And you turned it over to the Department of Justice? A. Yes.

Mr. Content: I offer in evidence Exhibit 8, Exhibit 8-A, Exhibit 8-B and Exhibit 8-C.

(Received and so marked.)

Cross-examination by Mr. Berkman.

Q. Mr. Speers, please tell us whether it is customary for organizations to notify the newspapers, sending them news items of proposed meetings or any other public activity? A. Yes.

Q. It is? A. Yes.

JAMES A. HAGERTY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a reporter on the *New York Herald?* A. I am.

Q. And were you a reporter on the *Herald* during the months of May and June of this year? A. I was.

Q. At any time during the last two months did you call at the office of the No-Conscription League, 20 East 125th Street, New York City? A. I did.

Q. Do you recollect what date it was? A. The time that I called there was on the Saturday before registration day; that would be June 2nd.

Q. June 2nd. What time of the day was that that you called there? A. About four o'clock in the afternoon.

Q. Now, will you tell us whom you saw there? A. The first person I saw—there were a number of others in the room, but the first person I talked to was a young man whose name I got, whose name was Saxe Commins; he told me his name.

Q. Anybody else? A. I understood it was Commins; I think it was Commins.

Q. Who else did you see there? A. Why, later I saw a number of others. I first talked with Commins.

Q. Were Miss Goldman and Berkman present at the time you were talking to Mr. Commins? A. Not when I first spoke to him.

Q. You had a conversation with Mr. Commins first? A. Yes.

Q. Do not state what it was, but after you had that conversation with him what happened next? A. Miss Goldman came into the room.

Q. Are you sure it was Miss Goldman whom you see sitting here? A. Yes; I am certain.

Q. What else? Did you have any conversation with her? A. Yes; I had a conversation with her.

Q. Tell us what that was? A. Why, the conversation was not very material. I endeavored to try to find out from Miss Goldman what the No-Conscription League was going to do. She told me what I already knew, that they were going to have a meeting in the Hunt's Point Palace the following Monday night, and I asked Miss Goldman if I could have a copy of *Mother Earth*. She informed me that it had not been obtained from the printers as yet. I think Miss Goldman told me, at any rate.

Q. Let us get that straight. You asked for a copy of *Mother Earth?* A. Yes.

Q. And Miss Goldman told you that they had not yet come from the printer; is that correct? A. Yes; that is crorect.

Q. What else was said, if anything? A. Miss Goldman told me that the *Mother Earth,* copies of the *Mother Earth,* were expected later in the afternoon.

Q. The same afternoon A. The same afternoon.

Q. Did you leave then? A. No; I waited for a while. I did not speak any further with Miss Goldman at that time. I think I went back to a desultory conversation with Mr. Commins and a number of others in the room—nothing of any consequence.

Q. There were a number of people in the room? A. Yes; there were a number of people in the room.

Q. So that there was nothing out of the ordinary in your staying there? A. Oh, no.

Q. What happened then next? A. Some time later some man came in with a number of bundles.

Q. Did you see the expressman who testified in court here yesterday afternoon? A. I did not notice him, not particularly.

Q. You didn't pay any attention to him? A. Paid no attention to him.

Q. But on this same Saturday afternoon, June 2nd, 1917, someone came with a number of bundles; that is correct? A. Yes; that is correct.

Q. Then go ahead. A. At Miss Goldman's direction Mr. Commins brought the bundles over to the table, and Miss Goldman and Mr. Commins opened them.

Q. They opened the bundles? A. Yes.

Q. Did you see what was in them? A. Yes; *Mother Earths.*

Q. You recognize that by this particular cover I hold up, do you (indicating)? A. Yes. Miss Goldman handed me a copy of *Mother Earth,* and I thanked her.

Q. I show you a copy of *Mother Earth* and ask you whether that is a copy that Miss Goldman handed to you? A. Yes; that is.

Q. How do you identify that particular copy? A. I identify the copy by the fact of that article signed by her, which I used in, and which was printed in, the *Times* the following morning, and which I cut out and pasted on my copy.

Q. And later, when I went over the testimony with you, I wrote your name, Hagerty, in there in your presence? A. Yes.

Mr. Content: I offer this copy of *Mother Earth* in evidence.

(Received in evidence as Government's Exhibit No. 29.)

Q. Now, after you received the *Mother Earth,* and thanked Miss Goldman for it, what did you do there further? A. I was just about to leave the room, and on my way to the door, a young woman whom I afterwards learned was Miss Fitzgerald——

Q. The lady who testified here yesterday morning as a witness, Miss M. E. Fitzgerald? A. Yes; she asked me if I did not want a copy of *The Blast,* Mr. Berkman's paper, and I said I did, and she handed me a copy of *The Blast.*

Q. I don't think you gave me that specified copy of *The Blast.* A. I did not have the copy.

Q. Would you recognize the copy you received by looking at the cover? A. Yes.

Q. Is the copy you received similar to this one (indicating)? A. Similar to that one; yes.

The Court: What is the number?

Mr. Content: Government's Exhibit No. 26.

The Court: Very good. Similar to Government's Exhibit No. 26.

Mr. Content: Yes.

Q. Did you make any endeavors to see Mr. Berkman? A. I did when I first went there.

Q. Whom did you speak to about Mr. Berkman? A. I asked Mr. Commins, after I came, told him I would like to see Mr. Berkman, and Mr. Commins said, as I recall it, that Mr. Berkman had been misquoted, and he did not care to see any reporters.

Q. So you did not see Mr. Berkman, but Miss Fitzgerald gave you a copy of his paper? A. Yes.

Q. See if I summarize your testimony correctly: When you first got there the copies of *Mother Earth* had not arrived, and you waited until later, when they arrived, and Miss Goldman, at your request, gave you a copy which has been received, as Government's Exhibit No. 29? A. Yes.

Q. That later Miss Fitzgerald voluntarily gave you a copy of *The Blast,* similar to Government's Exhibit No. 26? A. Yes.

Q. Is that practically all that took place that afternoon? A. Yes; I think so.

Q. You went there in pursuance of your duties as a reporter on the *New York Herald?* A. Yes.

Q. To find out what you could about this so-called No-Conscription League? A. Yes.

Q. That was the only purpose of your visit? A. The only purpose.

Cross-examination by Miss Goldman.

Q. When you came to the office of *Mother Earth* did you ask for a copy of the magazine? A. I did. You mean a copy of *Mother Earth?*

Q. Of *Mother Earth?* A. Yes.

Q. When the magazine was given to you did you pay for it? A. No, ma'am.

Q. It was given to you out of courtesy, for newspaper work? A. Yes, Miss Goldman.

Q. You said that you had a conversation with Miss Goldman? A. I did.

Q. Can you recall what the conversation was about? A. I can't recall clearly, because there was nothing in it that I could use for publication.

Q. Did you broach the subject of registration at all in your conversation with Miss Goldman? A. I think I did.

Q. Did Miss Goldman at any time—or, rather, would you be good enough to tell, as far as you remember, of course, what the conversation about registration was? A. I can only remember that there was nothing, Miss Goldman—I think I can say this properly—that there was nothing Miss Goldman said to me that was in opposition to the law.

Q. May I ask whether you placed in the issue of the *Herald* the entire article, or only quotations? A. I think I used the entire article in quotation marks.

Q. Then, I understand, and did the Court understand, that you were given a copy of *Mother Earth,* at your request, for newspaper purposes? A. That is true.

Q. Is that anything unusual, in your estimation? A. Not at all.

Q. And you, as a newspaper man, may I ask, took the copy of *Mother Earth* given to you for newspaper purposes, to the Department of Justice? A. I did not take it.

Miss Goldman: That is all.

By the Court.

Q. What did happen about that? A. Why, following the publication of the story in the *Herald* an agent of the Department of Justice called upon me, and at his request I gave him that copy.

Cross-examination by Mr. Berkman.

Q. You did not see me in the office of *Mother Earth* on that occasion, did you? A. No, sir.

Q. And when Miss Fitzgerald asked you whether you cared for a copy of *The Blast* she knew you were a reporter on some newspaper? A. She did.

Q. In other words, *The Blast* also was given to you for newspaper purposes? A. Yes.

Q. And when you sent in the article from *Mother Earth,* that particular article, to your paper, you sent the whole article in? A. The whole article from *Mother Earth?*

Q. Yes; that you published in the *Herald.* A. Yes.

Q. And you thought it was all right to publish that article in the *Herald?* A. Well, possibly——

Q. Well, I want to know yes or no.

Mr. Content: He has a right to answer that question in his own way.

The Court: That is a difficult question.

Mr. Content: Answer the question.

The Court: That question is quite indefinite. It would be one thing for a newspaper to publish a fact as a fact. That might or might not be all right, in the sense of meeting or not meeting approval or disapproval, as the case might be. The difficulty with your question is it may involve some question of the character of the article, as I understand it. See if I do not get it.

By the Court.

Q. As you have said, you went there as a reporter, for news? A. Yes.

Q. Now, when you got this copy of the *Mother Earth,* you took this article on the front page and quoted it in the article that you wrote for the *Herald?* A. Yes.

Q. It is the custom, is it not, well known to us all, that newspapers do set forth what facts have occurred? A. Yes.

Q. Irrespective of the merits of the case, good or bad? A. Yes.

Q. And do reports, writings, speeches, and other matters, which have become public facts, by being made known? A. Yes.

Q. And you are aware that on previous occasions that *Mother Earth* or *The Blast* called up the editor, or some reporter, informing them of some mass meeting to be held, for the news? A. Yes; so far as *Mother Earth* is concerned. I don't know anything about *The Blast*.

Q. But *Mother Earth* had repeatedly called you up to the office about various mass meetings which took place? A. I should think so. I know we have had notices from *Mother Earth*.

Redirect examination by Mr. Content.

Q. You did only use, for your story in the *Herald*, the article entitled "The Holiday," by Emma Goldman? A. That is all, from *Mother Earth*.

Q. You did not reprint any excerpts from the article entitled "June 5th," by Saxe Commins? A. No, sir.

Q. You did not print the article "Conscription," by Ben L. Reitman? A. No, sir.

By the Court.

Q. The only thing you did is what you told us? A. Yes.

By Mr. Content.

Q. Just that one article? A. Yes; from *Mother Earth*.

WILLIAM H. RANDOLPH, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are connected with the New York City Police Department? A. Yes.

Q. A patrolman? A. Yes.

Q. What is your shield number? A. 241.

Q. Are you also by training a shorthand reporter? A. Shorthand writer; yes.

Q. You report public meetings? A. Yes.

Q. Did you attend the meeting at the Harlem River Park and Casino, 126th Street and 2nd Avenue, New York City, on the evening of May 18th, 1917? A. I did.

Q. Do you recall whether Miss Emma Goldman was a speaker at that meeting? A. I do.

Q. She was or she was not? A. She was.

Q. What time of the day was the meeting held, approximately? A. The meeting started about half-past eight at night.

Q. Did you take stenographic notes of the speech of Miss Emma Goldman on the evening of May 18, 1917? A. I did.

Q. And in taking the stenographic notes did you take them to the best of your knowledge and ability? A. I did.

Q. And have you your original notes of the speech of Miss Goldman, your original stenographic notes of your speech, on May 18, 1917? A. I have.

Q. Will you open to the place in the notes—those minutes are on the first page of this book? A. The first page; yes.

Mr. Content: I ask to have this marked for identification.

(Marked Government's Exhibit No. 30 for Identification.)

Q. How far were you from the point at which Miss Goldman was standing during her speech? A. I was in the balcony, to Miss Goldman's left, I should say about twenty-five or thirty feet away, and up about twenty or thirty feet.

Q. And could you hear her distinctly at all times during her speech? A. Yes.

Q. Miss Goldman has a resonant voice, has she not? A. Yes.

Q. Did you take the notes, the minutes, of Miss Goldman's speech, and take them to your office, and did you make a transcript of your stenographic notes, Government's Exhibit No. 30 for Identification? A. I did.

Q. I ask you to look at this document and state whether or not that is a transcript of your stenographic notes of Miss Goldman's speech of May 18, 1917—that is to say, whether it is a transcript of Government's Exhibit No. 30 for Identification? A. It is.

Q. In transcribing the stenographic notes, Government's Exhibit No. 30 for Identification, did you transcribe them to the best of your knowledge and ability? A. I did.

Q. And do you believe this document which I hold in my hand to be an accurate transcript of your stenographic notes, Government's Exhibit No. 30 for Identification? A. It is.

Mr. Content: Well, I offer this in evidence.

(Transcript received in evidence as Government's Exhibit No. 31.)

(Government's Exhibit No. 31 was read to the jury by Mr. Content.)

Mr. Content: Now, your Honor, I would like to offer in evidence three form letters, Exhibits 4, 5 and 6 for Identification, that Miss Fitzgerald identified as form letters that were sent out, and which the defendants saw.

The Court: Very good.

Mr. Content: And which I inadvertently omitted to offer in evidence at the time.

The Court: Well, they are in evidence.

Mr. Content: Exhibits 4, 5 and 6 for Identification, in evidence.

(Marked in evidence Government's Exhibits 4, 5 and 6.)

By the Court.

Q. Have you any idea how many people were at that meeting, Mr. Randolph? A. Why, I cannot judge the number, but the hall was very crowded; in fact, it was congested.

Q. Would you say there were several thousands? A. I cannot judge the number. It was very crowded.

Q. A crowded hall? A. Very crowded.

Q. Have you any idea of the dimensions of the hall? A. No; I have not.

Cross-examination by Miss Goldman.

Q. Mr. Randolph, how long have you been a public stenographer? A. I have been a policeman; I have not been a public stenographer.

Q. How long have you been doing public stenography? A. I don't understand the question. I do not think I have been doing any public stenography.

Mr. Content: Well, police stenographer.

The Witness: Police stenographer; why, ever since I have been in the Police Department.

The Court: How long is that?

The Witness: Five years and eight months, off and on.

By the Court.

Q. Well, the point is, before you became a policeman, were you a shorthand writer? A. Yes.

Q. How long had you been a shorthand writer? A. About five years.

Q. Before you became a policeman? A. Yes.

Q. So that you have been a shorthand writer about nine years? A. Or more.

Q. Nine years or more? A. Yes.

Q. And did you learn shorthand writing in any school? A. I did.

Q. Where? A. In the day high school, the De Witt Clinton High School, and after that I took it up at the evening high school, and graduated from there in stenography.

Q. Before you became a policeman were you employed as a stenographer? A. Yes.

Q. Where? A. With the Brooklyn Navy Yard.

Q. How long were you there? A. About five years.

Q. And from there did you take the examination and become a policeman? A. I did. I have also taken three examinations, three civil service examinations, municipal civil service examinations, in this city, for the position of stenographer, and qualified in all three.

By Miss Goldman.

Q. Will you please, Mr. Randolph, tell us how many words a minute you can take? A. Why, I can't say at the present time how fast I can write.

Q. Approximately? A. Well, between 125 and 150 words.

Q. You can take that easy? A. Well, it all depends on the matter.

Q. On the matter? A. On the subject-matter; yes.

Q. Up to the meeting at the Harlem River Casino on the 18th of May, were you in the habit of taking down speeches delivered on platforms? A. Yes.

Q. Speeches and lectures? A. Yes.

Q. How long have you practised in that line? A. Why, ever since I am in the Police Department.

Q. And you can take 125 or 150 words a minute? A. According to the subject-matter; yes.

Q. Now, the subject-matter in the Harlem River Casino, was that an easy matter to you, or was it rather novel, new material? A. It was ordinary matter; I considered it ordinary matter.

Q. You have taken such before? A. Before.

Q. Speeches before? A. Yes.

Q. Do you—when you got to the Harlem River Casino, Mr. Randolph, did you see me there? A. I did.

Q. Did you speak to me? A. I did not.

Q. You did not ask to be shown to a box? A. I did not.

Q. You are sure of that? A. Positive.

Q. Have you any knowledge of any other stenographer representing the Government having been there?

The Court: You better say the Police Department or the Government.

Q. The Police Department; I beg your pardon. A. No; I have no knowledge of any other stenographer being there.

Q. Well, how did you happen to get in a box? You say you were in a box when you took the notes. A. I was not in a box; I was up in the balcony, in the rear of the boxes.

Q. Can you tell us whether the boxes are on the balcony? A. Yes; they are.

Q. How did you get to that balcony? A. Why, I walked upstairs, the same as everybody else was doing.

Q. Everybody else was walking upstairs without having an admission to a box seat?

Mr. Content: He said he didn't have a box seat.

A. I will explain, Miss Goldman.

Q. Please. A. When the crowds first came in, when the people first came in, there was an admission of fifty cents charged for the box seats in the balcony, and at that time I did not go into the balcony, I was on the main floor, on the left-hand side, about the center of the hall, on the side—on the right-hand side, I should say—and about nine o'clock, or a quarter after nine—it may have been half-past nine—I went upstairs to the balcony, as I saw all the other people going upstairs. There was no longer any admission charged at that time, and there was nobody at the stairs collecting tickets, or charging admission to the balcony seats.

The Court: When you went up?
The Witness: When I went up.

Q. And do you remember quite distinctly that you did not see me when you came to the hall? A. I didn't come to see you, but I was standing right alongside you when I bought a copy of *Mother Earth* and a book entitled "Anarchism," by you. You were standing at the table when I bought those books.

Q. You also remember quite distinctly that you did not ask me to be permitted in a box, as you represented the Police Department? A. I never spoke to you, Miss Goldman, that night or any other night. I have never spoken to you until now.

By the Court.

Q. As I recollect, your testimony was that you were about twenty-five or thirty feet away from where Miss Goldman was talking? A. Yes; I was in the balcony, to her left.

Q. There is no doubt she was below you, on the platform? A. Below, on the stage platform.

Q. Could you hear her distinctly? A. Yes; except at times, when the people in the balcony were either coming in or going out, or conversing, and there was

some times it was not very clear, but to the best of my ability I took everything I heard her say.

The Court: I see. Now, what did you do, transcribe this Government's Exhibit 31?

A. I did.

Q. I mean, that is your own work? A. That is my own work.

Q. How soon after you took the minutes did you do that? A. That was on—may I refer to my memorandum book?

Q. Yes; certainly. That is, I understand this meeting was on Saturday night, wasn't it?

Miss Goldman: It was a Friday night.

The Court: Friday; yes.

The Witness: Friday night.

Q. Now, you have a memorandum here that Miss Goldman finished at ten-fifteen? A. Yes.

Q. When was it you transcribed your stenographic minutes? A. On May 21st.

Q. That would be three days later? A. Yes, sir.

Q. This meeting was on May 18? A. Yes.

Q. And where did you do the transcribing? A At home.

Q. At your house? A. Yes.

Q. You have a machine there? A. I have a machine there.

Q. A typewriting machine? A. Yes.

Q. And are you confident that the contents of the transcribed copy, Government's Exhibit No. 31, agrees with your shorthand notes? A. Yes.

Q. You are sure of that? A. Yes.

Cross-examination by Mr. Berkman.

Q. Were you at that meeting, on May 18th, as a representative of the Police Department? A. I was.

Q. You used to be a policeman? A. I am.

The Court: He is.

Q. Oh, you are a policeman now?

Mr. Content: Yes; he gave his shield number, and said he was a patrolman.

The Court: The testimony is he has been a policeman for five years and eight months, and before that time he was a stenographer for several years, and employed in the Brooklyn Navy Yard, and from there he took his examination and became an officer, and he is utilized by the department to go around and take stenographic notes at public meetings, to which he is assigned. Is that correct?

The Witness: That is right, and I have also taken three city examinations, and qualified in all three.

Q. As a member of the police force you are aware that the defendants have been criticizing the police on the platform or in their writings—are you aware of that? You have heard that? A. Yes.

Q. You know that? A. Yes.

Q. And as a member of the police force that has thus been criticized are you not somewhat prejudiced against these defendants? A. Not at all.

Q. Absolutely not? A. No, sir.

Q. Now, you say you were taking notes back of the boxes, up in the gallery? A. Yes, sir.

Q. You stated that it was a very crowded meeting? A. Very crowded.

Q. Do you know that that is a very large hall? A. Yes.

Q. And do you know it would hold at least between five and seven thousand people? A. I don't know how many it would hold.

Q. As a man who has often attended mass meetings, would you say that this particular hall, Harlem River Casino, is regarded in New York as one of the largest halls? A. Yes; I know that.

Q. And in a large hall, very much crowded, there is usually considerable of whispering and talking going on? A. Yes.

Q. And you were quite a distance away from the platform—thirty-five feet?

The Court: He said twenty-five feet.

Q. About twenty-five feet?

The Court: Twenty to twenty-five feet, he said.

Mr. Berkman: Yes.

The Witness: Yes.

Q. And you were in the back of the gallery, back of the boxes? A. Yes.

Q. Was the gallery crowded? A. Yes.

Q. A great many people were in front of you? A. Yes.

Q. You could not see the speakers very clearly and distinctly? A. I could. I was standing on a table, and as a lot of other people were doing.

Q. Standing on a table? A. A lot of other people were standing on chairs and tables all over the hall.

Q. In the gallery back of the boxes? A. In the balcony back of the boxes.

Q. Are you sure there were tables back of the boxes? A. Yes; I was standing on one of them, I know.

Q. Back of the boxes? A. Yes.

Q. On a table? A. At that time there were tables, that night.

Q. Standing on the table there, you were not very comfortable, were you? A. Not very; no.

Q. Are you sure that in that condition you could take down very faithfully everything that was said? A. Yes.

Q. You were not very comfortable? A. Well, I was comfortable enough to be on the table, standing away from the other people.

Q. You had no table to write on, or any desk? A. No, sir.

Q. And you mean to say you took down everything exactly? A. Yes; what I heard and understood.

Q. Isn't it customary——

The Court: He said everything he heard and understood, except the name he could not get.

Mr. Content: Madam Breshkovska.

Mr. Berkman: Yes.

The Court: Yes; and a few names of a few Senators he couldn't get.

Q. Some sentence you missed? A. Yes.

Mr. Content: That is all indicated here.

Q. Would it be possible for you to misunderstand certain words and write them down differently? A. Hardly; although I might have misunderstood one or two words, or something of that kind.

Q. You might have misunderstood one or two words? A. I might have; yes.

Q. Before the meeting on May 18, when was the last time you attended a similar meeting?

The Court: Well, you mean a mass meeting?

Mr. Berkman: Of that character, a socialist, or no-conscription or anarchist mass meeting.

The Witness: Why, about two or three weeks before.

Q. Two or three weeks before? A. Yes.

Q. What was the character of that meeting? A. I think it was of the same nature.

Q. You think it was of the same nature? A. Yes.

Q. Who was the manager of that meeting; do you know? A. I don't know.

By the Court.

Q. Where was it? A. It was in 4th or 5th Street.

Q. In a hall? A. Yes.

By Mr. Content.

Q. On the East Side? A. East Side; I think it is No. 85 Fourth Street.

By Mr. Berkman.

Q. English-speaking? A. Yes—no, sir.

Q. You attended a meeting on Fourth Street which was not an English-speaking meeting? A. Yes.

Q. Do you understand any other languages outside of English? A. Yes.

Q. What particular language? A. German.

Q. Were there any German speakers at that hall? A. No, sir.

Q. Did you understand any of the speeches made at that meeting? A. I would not say I did; no.

Q. Then, it is not important that you attended a meeting that you did not understand?

Mr. Content: That is not the question. That is important. You asked what was the last meeting of that kind he attended, and he answers you.

Mr. Berkman: Perhaps I did not express myself right.

Q. What was the last meeting you attended of that nature, where you took stenographic notes?

The Court: What was the last meeting of a socialist or an anarchist character, or no-conscription meeting, prior to this time, in the Harlem River Casino, at which you took notes?

The Witness: I think that was the last one, in Fourth Street.

By Mr. Content.

Q. But you did not take notes at that meeting? A. I did not take notes there.

Q. What was the last meeting you reported stenographically? A. I don't just remember, just now. I don't remember.

By Mr. Berkman.

Q. Approximately a month before, or five years? A. I can't remember.

Q. But you don't remember whether or not within the last five years you attended a similar meeting, at least once or twice? A. Oh, yes; I have attended different——

Q. I mean taking stenographic notes? A. I have attended different meetings, but I don't remember just when I attended the one before May 18th, outside of the one down in Fourth Street.

By the Court.

Q. Give us some meeting you attended—that is what he is after—where you made notes, if your memory serves you. Have you got any memoranda, or anything— A. I can't just remember of any now; no, sir.

By Mr. Berkman.

Q. If you had attended a meeting of that character within recent times, before the 18th, wouldn't you remember it, that you had taken stenographic notes? A. Why, I have attended so many meetings I can't remember them all. I don't always take—I take notes, but don't always transcribe them unless they are of a nature that are wanted.

Q. But I mean at what meeting did you take stenographic notes before May 18th? I ask if you can remember one particular meeting that you took stenographic notes at before May 18th? A. No; I don't remember.

Q. It is very likely that within the last six months you have not attended any meeting of this character and took stenographic notes? A. I think I have, but I can't remember.

Q. You are not sure? A. I am not sure; no.

Q. How many meetings of this character do you think you attended and took stenographic notes at within the last year, approximately? A. I have attended quite a few, but I don't know how many.

Q. I mean of this character?

Mr. Content: What do you mean by "of this character"?

Mr. Berkman: Socialist, no-conscription or anarchistic.

Mr. Content: He could not have been at any no-conscription meetings.

The Court: You mean there were not any no-conscription meetings as far back as a year ago.

Q. Or any socialist or anarchist meeting? A. I have attended quite a few, but I don't remember how many I have attended.

Q. Did you take stenographic notes at those? A. In some I did.

Q. In some? A. Yes.

Q. And you cannot state any meeting that you took stenographic notes at, outside of the meeting then, on the 18th? A. No, sir.

Q. Is it not a fact that conscription and registration are new forms, that you have not heard these terms two years ago or a year ago? A. Yes; they are new.

Q. They are new things? A. Yes.

Q. Isn't it very likely that public speeches made about conscription would involve new words, and new terms? A. I don't think so; no, sir.

Q. You don't think talking about a new matter, a new subject, would involve a new term or a new expression? A. I do not consider that new matter.

Q. That is not new matter? A. No, sir.

Q. You have always had conscription in this country? A. No; I don't mean that, but I mean the general subject-matter is not new.

Q. Was conscription ever discussed in this country, except in recent months? A. No. I don't know; I think it may have, in connection with England, it may have been.

Q. I am speaking about this country.

Mr. Content: A word is a word. What is the difference whether it was discussed in Australia or Ireland?

By the Court.

Q. Well, of all those things that were read as your transcribed minutes was there any word, outside of the word conscription, that was in any sense, from your point of view, a new word? A. No, sir.

Q. Now, registration; you have heard that word in connection with the elections? A. Yes.

Q. Violence is not a new word, is it? A. No, sir.

Q. When you get off the stand will you find in your minutes the word "register," the word "conscription" and the word "violence" in your original minutes? A. Yes.

The Court: And you just show those three words to the stenographer.

Mr. Content: Let him show them to the official stenographer of the court.

The Court: You will show those words to the official stenographer of the court, and you can show also those words to the stenographer who is acting for the defendants.

The Witness: Yes.

Q. Can you look through the minutes of this quickly now? A. I think so; yes.

Mr. Content: I may read to the jury while he is doing that, if it will save time.

The Court: All right.

Mr. Content: This is Government's Exhibit No. 8, 8-A, 8-B and 8-C, the letter re-

ceived by the city editor of the *Times*. I will not read the letter, because it is the same as the letter that Mr. Demorest received, but the subscription blank was not in it, was not in Mr. Demorest's letter; he had a notice of the June 4th meeting; that is not in this letter, and 8-A is the same manifesto already read to you (reading subscription blank).

Mr. Content: Now, this letter (indicating), this was inadvertently not marked in evidence. That is the same kind as that letter.

The Court: Let it be marked in evidence.

Mr. Content: It will be 9 for Identification, marked in evidence.

(Marked in evidence as Government's Exhibit 9.)

Mr. Content: This is the letter addressed to Clarence Lyman Collins, at the Ansonia, and is the same form letter of May 25, the same subscription blank, and the same manifesto, and the announcement of the June 4th meeting at Hunt's Point.

I offer in evidence also Government's Exhibit 10 for Identification. That is a similar letter, which Miss Goldman signed, and which bears her name, and ask to have them marked in evidence.

(Marked in evidence as Government's Exhibit 10, 10-A, 10-B and 10-C.)

Mr. Content: This is the same form letter (indicating), and this is the rubber stamp, "Emma Goldman," exactly the same letter, and the same hand bills, the same contribution blank, and the same circular, sent to Frank Harrison, Denver, Colorado. The letter was returned to the sender, because he was not at that address, but it was postmarked New York, and deposited in the mails May 25th, 1917, at Station L.

Now, these are Exhibits 5, another form letter, on the same letterhead, undated, but Miss Fitzgerald said she believed that this came between the one I have already read, "A," of May 25, and June 7th (reading same).

This is Exhibit 6, being another form letter of June 7 on the same letterheads (reading same).

(Examination of Mr. Randolph's stenographic minutes by the official stenographer and the stenographer for the defendants.)

Mr. Content: This is Exhibit 25; I will not read it all. I will read just such parts as I want, and the other side can read what they want of it afterwards.

(Reading from Exhibit 25, copy of *Mother Earth*, by Mr. Content.)

Mr. Content: I also call the jury's attention to the back page, being the announcement of the no-conscription mass meeting of June 4th, with the words, "On the Eve of Registration, Hunt's Point Palace; speakers, Emma Goldman and Alexander Berkman," the same as the hand bills I read to the jury.

By the Court.

Q. Now, Mr. Randolph, while the United States Attorney was reading those exhibits to the jury, did you show the words that I spoke of, namely, "register," "conscription" and "violence" to the official stenographer, Mr. Hawthorne, and to the stenographer for the defendants, Mr. Munter? A. I did.

Q. And you exhibited those certain portions of your stenographic notes in which those words appear to the official stenographer and Mr. Munter as well? A. I did.

Q. Now, what is your stenographic system or school? A. Isaac Pitman shorthand.

Q. Now, in your Isaac Pitman shorthand—that is a very old-established stenographic system? A. Yes.

Q. Now, in your method of taking stenographic notes you follow the Pitman system, or do you have signs of your own? A. I follow the Pitman system.

Q. You have no signs of your own? A. No, sir.

Q. So that any person familiar with the Pitman system can read your notes? A. Yes.

Q. And when you are assigned to a meeting, when you go to a meeting like that of the Harlem River Casino, is it a fact that you are assigned there by some superior officer in the department? A. Yes.

Q. And it then becomes your duty to go to the place assigned and take the speakers? A. Yes.

Q. Now, sometimes, I gather from what you say, you transcribe them, and sometimes not? A. Yes.

Q. And obviously you transmit them always, when you are so ordered, to your superiors? A. That is correct; yes.

Q. And is it correct that owing to your being a stenographer you are utilized from time to time by the Department of Police to attend the various kinds of meetings, all different sorts of meetings, for the purpose of taking the words there uttered? A. Yes.

Q. Now, you said that your speed depended upon the subject-matter? A. Yes.

Q. Do you mean by that that if you had to attend some meeting where technical terms were used, in science, for instance, that it would not be as easy to take your minutes as it would be where the words of ordinary significance were used? A. That is correct, and also in the case of Miss Goldman speaking; I judge she spoke at the rate of about one hundred words a minute. She might have exceeded that at times and spoke at a rate of one hundred and twenty-five words a minute. She had to speak kind of loud, and naturally she spoke somewhat slower in order to be heard.

Q. Now, except at that meeting, for those names of persons like the names of Senators, or the same of this Russian, which was referred to, and the occasional noise around you, except those instances, did you have any difficulty in taking what was said? A. No, sir.

Q. No difficulty at all? A. No, sir.

By Mr. Berkman.

Q. Have you ever been assigned to very important meetings, like conventions, or such, which require experts? A. No, sir.

Q. Have you a reputation as an expert stenographer? A. No, sir.

Q. What is the average of your writing? A. About 100 or 125 a minute.

Q. And you say Miss Goldman speaks at the rate of about one hundred?

The Court: He said at one hundred. She spoke, I understood him, generally at the rate of one hundred words a minute, because there was a big crowd, and she spoke distinctly and slowly. Is that correct?

The Witness: Yes.

Q. You are not aware that Miss Goldman occasionally uses Russian names, or refers to Russians, that you might not understand—or, I will put it differently—were there Russian names mentioned you did not understand? A. Yes.

Q. What was the reason you did not take down the names of the Congressmen mentioned?

Mr. Content: Senators.

Q. Senators and Congressmen. A. I did not understand the names.

Q. You did not understand the names of the Congressmen and Senators? A. No, sir.

Q. You also said that Miss Goldman spoke very distinctly, loud and slowly? A. Yes.

Q. And that you did not understand the names of the American Congressmen?

The Court: No; American Senators.

Mr. Berkman: Or Senators.

A. No, sir.

The Court: Are the names you spoke of American names?

Mr. Content: LaFollette is not an American name.

The Court: LaFollette is not an ordinary name.

Q. Would you be able to understand the name, a name like LaFollette, and be able to write it down quickly? A. If I heard it distinctly; yes.

Q. I mean are you sufficiently familiar with public questions to be able to understand the literature without the language of the layman—and social questions?

Mr. Content: No; that has not a thing to do with it.

The Court: That is too hypothetical.

Mr. Content: I want to call the Court's attention to the fact that where he could not get the Russian names he put a couple of letters, and could not finish it.

Q. You know Senator LaFollette plays quite an important role in this country, so that you see his name quite often in the papers? A. Yes.

Q. And the names of Senators would not give you any difficulty, so far as that is concerned A. Well, it all depends on how well I understand the name when it is spoken. If it was a name I was familiar with it would be easier to understand that name when it was spoken.

Q. If the speaker speaks distinctly, slowly and loudly, why should you have any difficulty in taking down what she said?

Mr. Content: I object. That is argumentative.

The Court: He may answer it.

A. At that meeting those names I mentioned were spoken rapidly, to the best of my recollection, and for that reason I think I could not understand them distinctly.

Q. That particular name was spoken rapidly? A. The names were spoken rapidly.

Q. Is it not more natural that a speaker would speak names rather more distinctly than ordinarily?

Mr. Content: He does not claim he is a public orator, like Mr. Berkman.

Mr. Berkman: But he has attended mass meetings.

The Court: That question is argumentative. Objection sustained. You never can tell. Sometimes some people mention them slowly, others quickly.

Q. But I mean it is rather unusual that you are not able to take down the names of American Senators?

Mr. Content: That is argumentative.

The Court: That is argumentative. Sustained.

Q. And you were also not able, naturally, to take down the names of Russians?

The Court: He said that several times.

Mr. Content: If he can spell Breshkovska he should get a medal.

Q. There may have been references to Russia which would have been difficult for you to understand and take down?

The Court: No; the question should read, "Outside of what you do indicate you did not take down, was there anything else you did not take?"

Mr. Berkman: I mean that the Russian names being mentioned, necessarily there must have been references to Russia. These Russian names are Russian revolutionists.

The Court: Well, it says, in the transcript, something or other like "Als."

The Witness: With reference to Russia.

Q. You did not take down anything referring to Russia?

Mr. Content: That is not a fair question.

Q. Did you take down everything referring to Russia? A. I think I did; yes.

Q. Everything? A. I think I did; yes.

Q. No names?

The Court: He says he did not take those names.

Mr. Content: There is only one in the whole transcript.

The Court: Well, that name. I don't know what it is myself yet.

Q. There might have been other Russian names mentioned? A. At that time?

Q. Yes. A. There might have been, but I understood it to be one name. I think it was one name, and I could not understand that name.

By Miss Goldman.

Q. Will you please tell us of the three examinations for shorthand, stenography, you have taken?

What were these examinations? A. Regular shorthand examinations, held by the Municipal Civil Service Commission of this city, for the position of stenographer and typewriter.

Q. Did you require three different examinations? A. No; I have taken three different examinations of the same kind, at different times.

Q. I see. A. When the list expired I took another examination. When that list expired I took another examination.

By the Court.

Q. Was that before you came into the Police Department? A. Yes; I think I took one while I was in the Police Department, the third one—I think I was in the Police Department before I took that one.

Q. What is that, the position of stenographer and typewriter to a public department? A. In the city service.

Q. In the city service? A. Yes.

By Miss Goldman.

Q. Please tell us whether you have ever reported in court? A. No; I have not.

Q. You stated that at the meeting you were on the balcony in the back of the boxes? A. Yes.

Q. You were standing on a table? A. Yes.

Q. But you also said, I believe, that the meeting began about half-past eight, or a quarter to nine, and that the defendant Miss Goldman spoke at length. How long, approximately, do you think she spoke at that meeting?

The Court: The transcript of the minutes containing his memorandums has the beginning and the end. I don't know whether you saw it.

A. My transcript shows she started to speak at 9.45 and had completed at 10.15 P. M.

Q. That means three-quarters of an hour? A. That means one half an hour.

Q. I beg your pardon. You were standing on the table. Did you have any kind of support while you were standing on that table? A. Why, the table was one of those round tables, and the table was against the wall, and I was leaning against the wall at times.

Q. You were leaning against the wall? A. Yes.

Q. How far back into the box? A. Why, the table I was standing on was about, I think that is about twelve or fifteen feet. The wall is about fifteen feet from the rear of the boxes in the balcony.

Q. Now, would you please tell the Court—or, rather, I think it is permissible to demonstrate how you held your book, and how you were taking your notes, while you were standing at the back of the wall? A. Why——

The Court: Just get up.

A. In this manner (indicating); and at times I was leaning against the wall.

Q. And you held your note book in your hand? A. Yes.

Q. And for half an hour? A. Yes.

Q. And were taking notes during all that time? A. Yes.

Q. And listening carefully to what I had to say during that half hour? A. Yes. And I had a copy of *The Blast*, and some other pamphlets, underneath my book, at the time, which I purchased at the meeting.

Q. Now, is it possible that while you were taking these notes, standing up, without having a support for your book, that during that half hour, while you were taking the notes, is it possible, do you think, that something might have escaped you from the speech delivered by Emma Goldman that evening, of May 18th? A. Yes; as I stated before,

I could have missed a line, or a few lines, when people were coming and going. There were constantly people going and coming at the place where I was standing, but I have taken the substance of your speech at that time.

Q. The substance? A. The substance; yes.

Q. Then, will you tell us how it happens that you did not take such a distinguished American name as Senator Stone? A. Because, as I stated before, I think, to the best of my recollection, at that time, she mentioned those names rapidly, and I did not clearly understand them, and if I would have I would have certainly made a note of them.

Q. Now, in taking the substance of my speech, as you said, a great deal must have escaped you?

> Mr. Content: I object to that. That is not a fair question.
>
> The Court: Objection sustained. How much did you miss, do you think?
>
> The Witness: Why, I don't think I missed very much. I might have missed a few lines here and there, as the people were coming and going, and during the noise, and the talking, and the like of that.

Q. I see. Then you took down what you thought was the substance of the speech? A. I took down what I heard you say, what I could hear and understand you say.

Q. You took down everything, as far as you were able? A. To the best of my ability.

Q. What I said? A. Yes.

Q. During the half hour? A. Yes.

Q. Just one more question. I would like to ask you, then, do I understand you to say that your notes, your stenographic notes, do not represent an exact record of the speech delivered by Emma Goldman on May 18th at the Harlem River Casino? A. They represent everything that I heard you say, and everything that I could understand you say.

Q. One more thing, and that is did I understand that you transcribed these notes three days later? A. Yes.

Q. The notes were taken on Friday? A. Night.

Q. Friday night, and you transcribed them when?

The Court: On the 21st, he said.

A. May 21st.

Redirect examination by Mr. Content.

Q. Did you take down there all you could hear and understand Miss Goldman said? A. I did.

Q. You don't mean you just took down here and there the substance of her speech? A. No, sir.

Q. Is there any question—will you look at your notes with me—is there any question that you heard her use these words, "We believe in violence and we will use violence"? A. No, sir; there is no question about that.

Q. Did you hear her say that? A. I did.

Q. Have you the recollection independent of your notes that she used those words? A. Yes.

Q. I will read you this, one paragraph further—no; perhaps two paragraphs further—"It will not be such an easy job, and it will compel the Government to sit up and take notice, and, therefore, we are going to support, with all the means at our support, with money and publicity—we are going to support all the men who will refuse to register, and who will refuse to fight." Do you now say she used the words, "Who will refuse to register?" A. Yes, sir.

Q. Is it likely that you would have confused any other word with the word "register"? A. No, sir.

Q. "Conscription" don't look very much like "registration" in shorthand, does it? A. No, sir.

Q. Two paragraphs further down, "We will have a demonstration of all the people who will not be conscripted and who will not register." See if you can find that? A. Yes.

Q. Could you have confused those words, "Who will not be conscripted and who will not register," with anything else? A. No, sir.

Q. Have you any independent recollection that Miss Goldman used the word "register" or "registration" during the speech—independent of your stenographic notes, that is? A. I have.

Recross-examination by Mr. Berkman.

Q. You realize you are testifying under oath? A. I do.

Q. And you are sure that Miss Goldman said, "We believe in violence and we will use violence"? A. I am.

Q. And the police took no action in the matter? A. I don't know.

Q. Were the police there? A. I was not near Miss Goldman enough to see if they did or not.

Q. You don't know whether the police took any action in preventing that meeting, as it were? A. I don't know whether they did or not.

Q. She was permitted to continue the speech? A. Yes.

Q. Secret service men were there? A. I don't know.

Q. I am asking. Were the police there, so far as you know? A. I think so.

Q. Were detectives there, as far as you know? A. I think so.

Q. And they permitted Miss Goldman to continue her speech? A. Yes.

The Court: Just write on this piece of paper, write in shorthand, "register."

(Witness writes.)

Now, in the middle of the line, write "conscription."

(Witness writes.)

And, now, the last word, write "violence."

(Witness writes.)

By the Court.

Q. Now, this is "register"? A. Yes.

Q. And this is "conscription"; is that right? A. Yes.

Q. And this is "violence," is it? A. Yes.

The Court: Now, let this be marked.

Mr. Content: I will offer that in evidence as Government's Exhibit No. 32.

(Marked in evidence as Government's Exhibit No. 32.)

The Court: Now, let that be shown to the stenographer for the defendants, and have him show it to the court stenographer.

Mr. Content: Will the Court make a note that Mr. Hawthorne says that they are all distinct, that there is no similarity between the three at all.

The Court: Yes.

CHARLES PICKLER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a member of the bar of the State of New York? A. Yes.

Q. A member of the Federal bar also? A. Yes.

Q. You are also by occupation a shorthand reporter? A. Yes.

Q. You have had some experience taking down reports of meetings and public hearings, and so forth? A. Yes.

Q. At the request of the No-Conscription League, or the defendant Alexander Berkman or Emma Goldman, did you take and transcribe the speeches delivered at the Hunt's Point Palace, Borough of

the Bronx, in the City of New York, on the 4th day of June, 1917? A. No, sir.

Q. At whose request did you take them? A. The S. S. Company.

Q. That is the Stenographic Service Company? A. Yes.

Q. 55 Liberty Street? A. Yes.

Q. You are an outside stenographer? A. I am a public shorthand reporter.

Q. And they asked you to take them down? A. Yes.

Q. Did you take down in shorthand the speeches, the speeches of all the speakers at that meeting at the Hunt's Point Palace, on the Southern Boulevard, in the Borough of the Bronx, on June 4th, 1917? A. I took down all those who spoke in English.

Q. Well, none of them spoke in any other language, did they? A. I don't think so; I don't believe so.

Q. Did you take the speech in shorthand of Leonard D. Abbott? A. I did.

Q. Did you take the speech of the first speaker, Howard H. Hutchinson? A. I did.

Q. Did you take the speech of Mrs. Ballantine? A. I did.

Q. Did you take the speech of Mr. Peter Kane, Jr.? A. I did.

Q. Did you take the speech of Alexander Berkman? A. I did.

Q. Did you take the speech of Miss Emma Goldman? A. I did.

Q. She was the last speaker, wasn't she? A. Yes, sir.

Q. From time to time did you take the introductory remarks of the chairman in introducing a speaker? A. I did.

Q. I show you a transcript of the meeting of the No-Conscription League found in the headquarters of the No-Conscription League on the date of the

arrest, and I ask you whether you have compared that transcript with the stenographic notes taken by you of the speakers at the Hunt's Point Palace meeting on June 4th, 1917? A. Yes.

Q. Is that an accurate transcript to the best of your knowledge and belief of the stenographic notes taken by you of the minutes of the speeches of that meeting? A. It is an accurate transcript.

Mr. Content: I offer this in evidence; I offer the entire transcript in evidence.

(Received in evidence and marked Government's Exhibit No. 33.)

Cross-examination by Miss Emma Goldman.

Q. You are an expert stenographer, are you? A. I am a shorthand reporter, Miss Goldman.

Q. And may I ask you how long you have been taking shorthand? A. About twenty-five years.

Q. May I also ask you whether you have taken shorthand notes at meetings similar to the character of the Hunt's Point Palace? A. I have.

Q. In your estimation, Mr. Pickler, is it possible for a stenographer to take notes standing up during half an hour without supporting his book?

Mr. Content: I don't want to appear technical, but he has not testified that he took them standing up. He is only called as to this testimony in taking the speeches at the direction of the S. S. Corporation, and that that is an accurate transcript of the speeches he took down; but that don't make him an expert on the part of the Government——

The Court: I think that is correct.

Mr. Content: I would not then want to cross-examine him; I wouldn't want to impeach my own witness.

The Court: I will sustain the objection

without prejudice to recalling him when the defendants' case is presented, if there is any.

(Consultation between Court and witness.)

The Court: Mr. Pickler tells me that he is very busy, so I will let him answer it now. Of course, the answer binds the defendants.

By the Court.

Q. Were you here when Mr. Randolph stood up? A. Yes.

Q. Did you see how he held his book? A. Yes.

The Court: All right, then, you may answer.

The Witness: Have you finished your question, Miss Goldman?

Miss Goldman: Perhaps I will repeat the question.

By Miss Goldman.

Q. Standing up on a table, without a support for the book to lie on, other than the hand, of course, do you think it is possible to take accurate notes of what the stenographer would hear, of course, during a half hour? A. May I ask, Miss Goldman, what kind of a book he had, what sort of a cover it had? May I ask what speed the young man testified he could write at?

Mr. Content: 100 words a minute, on the average.

Mr. Randolph (standing up): I was standing like this (exhibiting book).

The Witness: 100 words a minute?

Mr. Randolph: Yes.

A. No.

Mr. Content: I don't care to cross-examine him now. I may recall him after. He is the defense's witness.

The Witness: I tell you that is perfectly absurd. Miss Goldman speaks 200 words a minute.

Mr. Content: Now, this witness is plainly prejudiced.

The Witness: I am not prejudiced at all.

Mr. Content: I am talking to the Court, not to you. This witness knows all about Miss Goldman, and——

Mr. Berkman: I object to Mr. Content trying to——

The Court: Yes; objection sustained.

Mr. Content: I don't care to cross-examine him.

The Court: Very good.

Mr. Content: I will now read *The Blast.* Will your Honor instruct the jury that the last witness, in the question that was asked by Miss Goldman, was not my witness, and it was not part of the Government's case?

The Court: Yes; they are so instructed.

(Reading of exhibits to the jury by Mr. Content.)

ESLI L. SUTTON, called as a witness on behalf of the Government, was first duly sworn, and testified as follows:

Direct examination by Mr. Content.

Q. You are an official stenographer in the United States District Court for the Southern District of New York? A. I am.

Q. How long have you been a shorthand reporter? A. About twenty years.

Q. At the request of the United States Attorney for the Southern District of New York did you attend a meeting held at the Hunt's Point Palace,

in the Borough of the Bronx, New York City, on the 4th day of June, 1917? A. I did.

Q. Did you take stenographic notes of the speeches of the speakers on that evening? A. I did.

Q. You have since examined the stenographic transcript of the S. S. Company, which I gave you—is that correct? A. Yes, sir.

Q. And have compared it with your stenographic notes? A. I have.

Q. And is it an accurate transcript of your stenographic notes? A. It is, except in some small minute details, where we were unable to hear.

Q. Well, Mr. Pickler was a little nearer than you were? A. He was.

Q. You took down the speeches to the best of your knowledge and ability at the time? A. I did.

Q. And there was some little confusion from time to time around the place which drowned out the last words of the sentences—something of that sort? A. Yes; and during sentences, at times.

By the Court.

Q. But, outside of some such minor details, this Government's Exhibit 33 is a correct transcript? A. Yes; it is a correct transcript of what was said there.

Q. You took Miss Goldman's speech that evening, did you? A. Yes.

Q. About how many words a minute did she speak? A. Well, I should judge she ran about 100 or 110 words a minute. She is not a fast speaker in a hall of that kind.

Q. She has a very loud and resonant voice? A. She has.

Q. Is she an easy person to report stenographically? A. She is; yes.

GEORGE D. BARNITZ, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a detective sergeant connected with the City Police Department? A. Yes.

Q. Attached to what squad? A. The bomb squad.

Q. How long have you been a police officer? A. Twenty-one years.

Q. What is your shield number? A. 438.

Q. Were you present at the time that United States Marshal McCarthy arrested the defendants Alexander Berkman and Emma Goldman? A. I was.

Q. What date was that? A. The 15th of June, about four o'clock in the afternoon.

Q. Where? A. 20 East 125th Street.

Q. Were you there when the Marshal arrested Miss Goldman? A. I was.

Q. Who was arrested first, Miss Goldman or Mr. Berkman? A. Miss Goldman was arrested first.

Q. Where was she arrested? A. On the second floor of 20 East 125th Street.

Q. How much later was it when Mr. Berkman was placed under arrest by the Marshal? A. About two minutes later.

Q. Where was he arrested, if you know? A. On the floor above, the same building.

Q. At the time did you have any conversation with Miss Goldman? A. I did.

Q. To what did it refer? A. Referred to the publication called *Mother Earth.*

Q. I show you a copy of the *Mother Earth,* with "G. D. Barnitz" written on it in ink, and ask you whether or not you used that copy in having a conversation with her? A. I did.

Q. What was the conversation? A. I asked Miss Goldman what she, who was the Mother Earth Pub-

lishing Company, and whether it was incorporated or not, and she said it was not; she said I am the publisher and editor of *Mother Earth,* and I am responsible for everything that is in it. I then took a piece of paper I had in my hand, that document addressed to Mr. Content, United States Assistant District Attorney——

Q. I show you a letter and envelope addressed to Mr. H. A. Content, United States Assistant District Attorney, dated June 8, 1917, signed "Alexander Berkman and Emma Goldman," and ask you whether that is the paper to which you have reference?

Mr. Content: First, I would like to offer in evidence the particular copy of *Mother Earth* which Mr. Barnitz used in speaking to Miss Goldman.

(Marked in evidence as Government's Exhibit No. 34.)

A. I showed this paper to Miss Goldman, and asked her was she responsible for that document being sent to Mr. Content. She read it, and she said, "I was." I said, "Did Mr. Berkman arrange that with you?" and she said, "Mr. Berkman and I sent this document to Mr. Content together." I then took the document upstairs to where Mr. Berkman was, and showed it to him, and asked him whether he knew anything about this being sent to Mr. Content, and was it done by his direction, and he said, "It was sent by me and Emma Goldman; we sent this to Mr. Content together."

Q. Did you make a notation to that effect on the back of the paper? A. I did.

Mr. Content: I offer this in evidence, as Government's Exhibit No. 35, the letter, and the envelope, 35-A.

The Witness: At the same time I asked Mr. Berkman if there was anybody else associated with him in the publication called

The Blast, and he said there was not, that he was the editor and publisher of *The Blast.*

Q. I show you this copy of *The Blast,* with your name, G. D. Barnitz, on, and I ask you did you have this paper in your hand; is that the paper you had in your hand when you talked to Mr. Berkman? A. That was the one.

Mr. Content: I offer this in evidence.

(Marked in evidence as Government's Exhibit No. 36.)

Q. Now, at the time of the arrest, pursuant to the direction of the Marshal, various articles of literature, etc., were taken from the premises; is that correct? A. They were.

Mr. Content: May I recall Mr. Sutton for one question I forgot to ask?

The Court: Certainly. Yes.

ESLI L. SUTTON recalled.

Direct examination by Mr. Content.

Q. Is it possible that if a person is speaking at the rate at which Miss Goldman speaks, you having heard her speak, he can take a report of general, ordinary stenography on his book, standing up, providing there are some magazines underneath? A. Why, certainly. That is how the reporting in the Congress of the United States is done, standing up. I have reported many meetings standing up.

Q. I show you this; this is a regular stenographic reporting book? A. Yes.

Q. And if this were supported by a couple of magazines, or something, would it be possible to take down the minutes of a speaker at the rate Miss Goldman speaks, standing up? A. Yes; it is done every day.

Q. And done accurately? A. Yes; it is done every day.

By the Court.

Q. Now, you refer to a matter in Congress, when the different members of the House of Representatives are talking, and similarly in the Senate—is it not a fact that the stenographer is standing up all the time in taking his notes? A. Yes; it is.

Q. He goes usually near where the speaker is speaking? A. Yes; walks from where he was at the time the speaker arose, over within a good range of hearing.

Q. And as Congressman A finishes and Congressman B commences he walks over here (indicating), so as to be near the second speaker? A. Yes.

Q. And that is a fairly familiar method in the Senate? A. Done, as I say, every day.

Cross-examination by Mr. Berkman.

Q. You do not mean that the stenographers in Congress stand up for any length of time—for instance, a half an hour on a table? A. I mean there is one man on his feet.

Q. You don't mean—just to clear up this matter of the stenographers standing up in Congress—you don't mean the stenographers would be in a similar position in Congress as Mr. Randolph was at this meeting, at this crowded mass meeting, with a lot of noise, on a table, with the crowd all around him? A. Well, no: Congress is not a mass meeting, of course, and it is orderly.

Q. You do not mean also that the stenographer in Congress would stand up for half an hour without a chance to move, and still take absolutely correct notes, without shifting his position for half an hour? A. Why, I think so.

Q. He would stand, without shifting his position, and holding the book in his hand?

The Court: The question is, "Could he?"

A. He could.

Q. He could stand half an hour, and yet not be sufficiently tired to miss words, and have his notes partially incomplete? A. I think it would be perfectly feasible and practicable to report Miss Goldman, standing up for half an hour or an hour.

Mr. Berkman: I am talking now about Congress.

Mr. Content: What do they do in Congress—tell him?

Q. No; I mean would it be possible for a stenographer to stand up on a table in a crowded hall for half an hour, even for a longer time—I forgot to ask Mr. Randolph how he stood up—however, half an hour during one speech, without a chance to shift his position, and still take down accurate notes, and the stenographer not being an expert?

Mr. Content: That is not a fair question.

The Court: That is not proper. You can ask this: From your experience, do you think it would be possible for a competent stenographer to take a speech from 100 to 125 words a minute, standing on a table for half an hour, sometimes standing without support and sometimes standing supported by the wall back of him?

A. I should think so; yes.

Q. Is it not a fact that the Congress stenographers change their positions very often if they are forced to stand while they are taking their notes? A. Well, that is a matter of a man's own inclination.

Q. Is it not a matter of physical necessity, say, in order to keep the notes correct? A. Why, I don't think so. I don't know. That is for every man to say.

Q. Did you ever take stenographic notes in Congress? A. Did I ever? No; not in Congress.

By Mr. Content.

Q. You have seen it done? A. I have been there and seen it done.

Q. And some of the Congressmen often make a lot of noise, don't they? A. Yes.

Cross-examination by Miss Goldman.

Q. Please, Mr. Sutton, tell us, since Congress was mentioned, whether it is not a fact that the stenographers in Congress have their table to write on? A. Well, they have a table, but most of the reporting is done standing up.

Q. Just a moment. Isn't it a fact that the stenographers stand up only during the time when they are relieved by another stenographer? A. No; that is not the method.

Q. Did I understand you to say you had reported Congress? A. No.

Mr. Content: No; he did not. He said he had been there.

The Witness: I worked at one time for Mr. Murphy.

By Mr. Content.

Q. For whom? A. Mr. Murphy.

Q. That is the United States Senator from New York? A. No, no; the official reporter of Congress.

By Miss Goldman.

Q. How long a time, approximately, do you think the stenographers in Congress stand up to take notes? A. Why, I can't tell you that—from fifteen minutes to half an hour, three-quarters of an hour.

Q. Without using a table? A. Yes.

GEORGE D. BARNITZ resumed the stand.

Direct examination (continued) by Mr. Content.

Q. I show you the contents of this tray in my hand and ask you in whose office these were found? A. These were found in the office of Alexander Berkman, on the third floor of 20 East 125th Street.

Q. And have you affixed tags to each one of the things which are contained in this tray? A. Each package was marked.

Mr. Content: After lunch I will offer in evidence the different contents of this tray, but would the stenographer make a record at this time that this tray here is tray No. 1?

The Court: Say, Berkman tray.

Mr. Content: Berkman tray; yes.

Q. Now, I show you a second tray, and ask you where the contents of this tray were found? A. In the rooms occupied by *Mother Earth* and the defendant Emma Goldman.

Mr. Content: That may be called the Goldman tray?

The Court: Yes.

Q. I show you an additional bundle, containing a number of copies of the June issue of *Mother Earth,* and ask you where these were found? A. In the office of the defendant Emma Goldman.

The Court: Call that *Mother Earth* bundle.

Q. I show you an additional bundle, of the July, 1914, issue of *Mother Earth,* and ask where these were found? A. In the office of the defendant Emma Goldman.

Mr. Content: That is the July, 1914, issue.

The Court: Call that second bundle July, 1914, *Mother Earths.*

Q. I call your attention to a wooden box containing a number of wrappers, some stamped and addressed, others not yet stamped, and ask you where those were found? A. In the office of *Mother Earth,* with the defendant Emma Goldman.

The Court: Call that, wooden box.

Q. I show you a leather suit case, light brown leather, containing similar wrappers. Is that same testimony true as to all this as to the wooden box? A. The same thing in regard to the dress suit case, and a second dress suit case.

Q. A second, bigger dress suit case? A. The large dress suit case.

Q. They contain wrappers, with some publication enclosed, which is concededly *Mother Earth,* and they were all found in the premises of *Mother Earth,* or Miss Goldman? A. Yes; that is right.

By Mr. Berkman.

Q. Mr. Barnitz, when you asked Miss Goldman whether she was the editor and publisher of *Mother Earth,* did she answer frankly? A. Yes.

Q. And when you asked Mr. Berkman whether he was the editor and publisher of *The Blast,* did he answer frankly? A. He did.

Q. Did the defendants attempt to resist arrest? A. They did not.

Mr. Content: Will the stenographer note at this time that I offer all the contents of these trays and box in evidence, to be marked later.

The Court: We will take a recess at this time until five minutes past two.

(Recess until 2.05 P. M.)

AFTERNOON SESSION.

(2.05 P. M.)

GEORGE D. BARNITZ resumed the stand.

Mr. Content: Government's Exhibit No. 37 is a package of the June issue of *Mother Earth,* in the Berkman tray.

Government's Exhibit No 38 is a collection of form letters, similar to Government's Exhibits 4, 5 and 6, which have already been read to the jury.

Government's Exhibit No. 39 is a number of letters stamped and postmarked, similar to Government's Exhibit No. 10, which is a letter to Frank Harrison, duly sent through the mails, but returned to the sender.

Government's Exhibit No. 40 is a bundle of papers entitled "Free Speech and Free Press," by Harry Weinberger, of the New York bar.

Government's Exhibit No. 41 is a number of copies of the June issue of *The Blast,* similar to Government's Exhibit No. 26.

Government's Exhibit No. 42 is a bundle of addressed envelopes, but not stamped, with "The Blast" in the upper left-hand corner. They are of no particular consequence.

Government's Exhibit No. 43 is a bundle of leaflets announcing a meeting on June 23rd, entitled "Labor and War."

Government's Exhibit No. 44 is a leaflet entitled "McKinley's Assassination, from the Anarchists' Standpoint."

Government's Exhibits Nos. 45 and 45-A are the original and carbon copy of the copy of a hand bill for an open air demonstration at Madison Square Garden on June 16, the original and carbon copy.

Government's Exhibit No. 23 for Identification is now offered in evidence as one of the

things found. It is a circular letter of *The Blast*.

(Received in evidence as Government's Exhibit No. 23.)

Mr. Content: This is a circular letter of June 15, on the letterhead of *The Blast*.

Government's Exhibit No. 46 is a leaflet entitled "Workingmen, Why Should We Fight?"

Government's Exhibit No. 47 is a copy of a bill of the Walker Engraving Company, with a copy of the cartoon found in Berkman's possession.

Government's Exhibit No. 47-A is a copy of a cut.

Government's Exhibit No. 48 is a copy of a bill of the Walker Engraving Company, with a copy of the cut of *Mother Earth*.

That is the contents of the Berkman tray.

Now, this is the Goldman tray.

Mr. Berkman: May I ask the Court does all this go in as evidence in this particular case?

The Court: I am sure I do not——

Mr. Content: Yes; it is offered in evidence. It was found in the custody of the respective defendants at the time of their arrest.

Mr. Berkman: Well, the defense admits everything in their possession, in the office, of the magazines, the various publications, and all that. That is all admitted.

Mr. Content: Well, I have to have them marked.

The Court: They were all offered and received without objection before the recess. Now, if there is any particular one of these exhibits that you object to I will take it up. I am going to exclude, on my own motion, this pamphlet by Harry Weinberger. I do

not see that that has anything to do with the case.

Mr. Berkman: May we object to certain documents being put in there?

The Court: Certainly.

Mr. Content: Certainly.

Mr. Berkman: Which ones may we object to?

Mr. Content: Which ones do you want to object to?

Mr. Berkman: I don't think there is any number.

Mr. Content: Will I read them all over? I withdraw the offer of the pamphlet of Harry Weinberger.

The Court: All right.

Mr. Content: And move that it be stricken out of the evidence.

The Court: Yes; strike it out. Now, there is another pamphlet, Mr. Content, Exhibit 44, which I have just been examining.

Mr. Content: Do you want to exclude that?

The Court: "McKinley's Assassination, from the Anarchists' Standpoint"; I will exclude that.

Mr. Berkman: May I ask the Court who is the author of that?

Mr. Content: It is not named.

The Court: He is not named.

The Court: I was going to exclude it on my own motion, because there is nothing to show that the defendants were responsible for this paper, and it may have been found in anyone's possession.

Government's Exhibit No. 44 is excluded. I think that is all you offered, outside of the matters pertinent to the case.

Mr. Content: Yes; the other things are all *Mother Earth*, or *The Blast*, in the nature of exhibits already in evidence.

The Court: Just strike out Exhibits 44 and 40.

Mr. Content: This is the tray of Emma Goldman. A number of copies of the June issue of *The Blast*. I think we can cut down here on these three different sets of form letters, and that will save time.

The Court: Yes; those are form letters.

Mr. Content: Government's Exhibits 50, 50-A and 50-B are copies of form letters similar to Government's Exhibits 4, 5 and 6, already read to the jury.

These are some subscription blanks for the No-Conscription League, similar to those annexed to some of the letters which have already been marked in evidence, which are blank blanks. The same will be Government's Exhibit No. 51.

Government's Exhibit No. 52 consists of some pamphlets marked "Labor and War," announcing a meeting on June 23rd.

Government's Exhibit No. 53 consists of a few manifestoes similar to Government's Exhibit 1.

Government's Exhibit No. 54 is a large bundle of the June issue of *Mother Earth*. Give it one number.

Government's Exhibit No. 55 for Identification, not offered in evidence, the July, 1914, issue of *Mother Earth*, merely marked for identification. That is a bundle.

And the last exhibit, Government's Exhibit No. 56, that is the last number I offer, all the contents of the wooden box and the suit case, containing the June issue of *Mother Earth*, wrapped up in a newspaper wrapper.

The Court: That is all that contains?

Mr. Content: Yes. Shall we give it one number?

The Court: Yes.

(Marked Government's Exhibit No. 56.)

Mr. Content: That is a large number of *Mother Earths,* ready for mailing, in the wrappers.

WILLIAM H. RANDOLPH recalled.

Recross-examination continued by Mr. Berkman.

Miss Goldman: It it please the Court, we would like to know if we may ask at this point to have Mr. Randolph get up on the table, as nearly in the position as he was at that meeting, and whether we may further offer dictation to Mr. Randolph to take from *Mother Earth,* or any number of *Mother Earth,* or offer dictation for him to take as he would have taken it and did take it at that meeting. Is this how we do it now, and how will the Court instruct?

The Court: Well, I am perfectly willing he should do that. It is hardly practicable to get on the table. He can stand up.

Mr. Content: He can stand against the wall. There is a little platform there. He can stand there.

By Miss Goldman.

Q. Was that a round table or a square table? A. A round table.

Q. May we also ask was the table firm, like you are standing, or was it shaky? A. It was not fastened, it was firm.

Q. Well, you think then if you stand up you are nearly in the position you were at that table? A. I think so, yes.

Q. Did that table have four legs, or one leg? A. It was a round bottom, an iron bottom.

Q. You can't remember whether it was very shaky?

Mr. Content: He said it was not.

A. It was quite firm.

Mr. Content: But he said it was not fastened, however.

The Court: He now repeats the answer, it was quite firm.

Q. It was quite firm? A. Was not fastened.

The Court: Not fastened down.

Q. Not fastened down, but quite firm? A. Yes.

Mr. Content: Had a round iron stanchion or bottom?

The Witness: A solid iron bottom.

Mr. Content: A kind of a beer garden table?

The Witness: That's it.

Q. That is, of course, this would not be the position you were in at the Harlem River Casino? A. Not at all.

Mr. Content: Take that stand.

The Court: That is a very small stand. Mr. Randolph said that was almost solid.

By Mr. Content.

Q. How many magazines did you have under your book at the time? A. I had a copy of *The Blast* and *Mother Earth.*

Q. Didn't you say you had some other paper of Miss Goldman's, some lecture on anarchism? A. I had that in my pocket, it was a smaller book than that.

Q. Is that like the one you had under your book (indicating)? A. That is right.

Mr. Content: Just take these two. You are taking Government's Exhibits 41 and 37.

By Miss Goldman.

Q. We want to be approximately sure that you are in a similar position as you had in the Harlem River Casino? A. Yes.

Q. Now, you stated before that you were now and then leaning against the wall? A. Yes.

Q. While you stood on the table? A. Yes.

Miss Goldman: And I understand it was a round table with one leg.

Q. Now, when you leaned against the wall, where did you have your feet—were they in the center of the table, or the corner of the table? A. It would have to be the center, because if you were standing on the edge the table would move outward.

Q. And you would have to be very careful during your work to keep your feet in the center of the table? A. At that time, so as to keep your feet near the center of the table.

Q. And you further testified that people were coming and going all the time? A. Not all the time, some of the time.

Q. Where you were standing? A. Yes.

Q. Was your position quite secure in consideration of the fact that you were intent upon the speaker's speech? A. Yes.

Q. You were quite secure? A. Yes.

Q. Watching, while you were in the middle of the table, leaning against the wall, and listening to the speech? A. Yes.

Q. And having no table for your notes? A. Yes.

Q. Did you say there were other men standing on the table, or were you the only man? A. On adjoining tables, tables nearby. There were several tables along the wall, several tables there.

Q. You alone stood on that table? A. Yes.

The Court: I was going to say Miss Goldman could read. She can read from—the best way would be to read from the exhibit, read from the paper that he claims he took.

Miss Goldman: That is it.

The Court: Read from this very exhibit in evidence.

Mr. Content: From Exhibit No. 31.

Miss Goldman: Mr. Content, Madam Breshkovska is part of the provisional government in Russia, and she is left out here (indicating transcript).

Mr. Content: Naturally, when her name is so difficult to be taken in shorthand.

Miss Goldman: That is too bad for you. I am going to dictate, and it must naturally be slower than speaking. (Reading) "We don't believe in conscription, this meeting tonight being a living proof. This meeting was arranged with limited means. So, friends, we who have arranged the meeting, are well satisfied if we can only urge the people of entire New York City and America, there would be no war in the United States—there would be no conscription in the United States—if the people are not given"——

The Witness: You are not speaking at the rate of speed you spoke at the Harlem River Casino.

Q. Well, I must be permitted to read it as I always do. Just a minute, please, your Honor, then we are going to prove through different testimony, additional testimony, that as a matter of fact I am unfortunately a very rapid speaker.

The Court: Well, his testimony is that you spoke, as I recall it, around one hundred to one hundred and twenty-five words a minute.

The Witness: That is correct, your Honor. It would average one hundred, and at times went as high as about one hundred and twenty-five, according to my estimate.

Mr. Content: May I ask the official court stenographer whether he got all of Miss Goldman's dictation down?

The Official Stenographer: No, I did not. I could not understand all the words.

The Court: I think she was going pretty fast.

Miss Goldman: May I state here, to your Honor, that we can prove, as a matter of fact, that very few stenographers, unless they are great experts, are ever able to take me, because, as I said, I am unfortunately a very rapid speaker.

The Court: Well, just let me have that paper a minute.

Miss Goldman: Certainly (handing same to the Court).

Mr. Content: Will you note an objection on my part to further dictation by Miss Goldman at that rate of speed, I mean. The witness testified that is very much faster than Miss Goldman spoke on that evening.

The Court: Yes.

Miss Goldman: Exception taken.

The Court: Hand this to Miss Goldman, please (indicating Government's Exhibit 31).

Now, I just counted the words, and I know where one hundred ends, and one hundred and twenty-five words. I have not indicated to anyone where that is, where those words end. Now, read in any manner you please, Miss Goldman, and if anyone else has a watch, they may follow it, and I will follow to see how long it takes.

Miss Goldman: I am to read the same—

Mr. Content: Yes, the same, from the beginning.

The Court: Yes, the same.

Miss Goldman: Objection. May we not continue to read some other place.

The Court: Now, I did not suppose any such suggestion would be made, and I counted from the beginning now.

Miss Goldman: (reading) "We don't believe in conscriptiour, this meeting to-night being a living proof. This meeting was arranged with limited means. So, friends, we who have arranged the meeting are well satisfied if we can only urge the people of entire New York City and America, there would be no war in the United States, there would be no conscription in the United States, if the people are not given an opportunity to have their say. Therefore we hope at least that a small portion of the population of New York City to-night is having its say. Friends, what I have to tell you to-night I want to impress upon your minds with all the intensity of my being, that we have with us people who came to break up this meeting, and therefore, friends, I ask you, friends, in the name of peace, in the name of freedom, and all that is dear to you, to be perfectly quiet and when the meeting is over"——

The Court: That is enough. At one hundred words, thirty-five seconds had elapsed, and at one hundred and twenty-five words, forty seconds had elapsed.

The Witness: That was very much faster than she spoke at the Harlem River Casino.

Miss Goldman: I wish to offer, your Honor, that in speaking extemporaneously, it is known, I am sure, to your Honor, that

the speaker who speaks rapidly, naturally speaks more rapidly than reading.

The Court: That has all got to be a matter of evidence. I do not see that we can get anywhere with this, because you will be at liberty to produce testimony as to the manner of speaking, or as to how many words a minute the stenographers can take, and so on, and I have marked with great care where the one hundred words ended, and as I said before, it was thirty-five seconds, and one hundred and twenty-five words, forty seconds, between thirty-nine and forty seconds.

Miss Goldman: Would it be in place now to ask Mr. Randolph to read what he has taken down now?

The Witness: I have not gotten it all down, Miss Goldman.

The Court: Read what you took down first, when the interruption came.

The Witness (reading): "We don't believe in conscription. This meeting to-night being a living proof. This meeting was arranged with limited means, so friends, we can only urge the people that there will be no conscription in the United States"—that is as far as I got.

By Mr. Content.

Q. Miss Goldman just dictated to you. Was that much more rapid than her speech on that evening, May 18th? A. Yes.

By Juror No. 4.

Q. I would like to know at the time you were upon that table, in regard to this dictation, you merely placed yourself in a location where you would be at ease to take this dictation, whether it was round or smooth, or what? A. Yes, I tried to be in a position to see the speakers.

By the Court.

Q. Did you have instructions that night to do anything else than take the speeches that were made, to the best of your ability? A. No, sir; that was all.

Q. That was your instruction? A. Yes.

Q. And when you transcribed these minutes, did you do it by yourself? A. Yes.

Q. That is, it was your own work, was it? A. Yes.

Q. Was that done up at your home, or at police headquarters? A. It was done at my home.

Q. And when you had transcribed your minutes, did you then give the transcribed copy to some superior officer? A. I did.

Q. And is that the regular custom in regard to your work in the Police Department? A. It is. I wish to add, your Honor, that the reason I was only able to transcribe my notes on May 21st, was that I was working on some other cases in the meantime, and also had detective work, and my time was taken up on other work until I had an opportunity to transcribe the notes, and for that reason I transcribed my notes on May 21, three days later.

Q. Did you receive between the night of the meeting and the day you transcribed your notes, any particular order to transcribe them, or was that contained in your original order? A. Yes, sir; that was part of the order to transcribe them, as soon as I could.

Q. And you transcribed them on the 21st, without any further order? A. Yes.

Q. And in accordance with your usual custom in your work in the Police Department, in that regard? A. Yes.

Q. And when you have taken the minutes at some such meeting as this, then, if I understand you correctly, you transcribed them at your first available opportunity? A. Yes.

By Mr. Content.

Q. Between the time you took Government's Exhibit 30, your stenographic notes, for identification, and the transcript, 31, had you seen the District Attorney or Government's officers, or anybody else? A. No, sir.

BENJAMIN SILVERMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a sergeant in the Eighth New York Coast Defense of the United States National Guard? A. I am, sir.

Q. And, as a private citizen, did you attend a meeting held at the Harlem River Casino, New York City, on the evening of May 18, 1917? A. Yes, sir.

Q. Did you hear the defendant Emma Goldman speak? A. I did, sir.

Q. Have you heard her speak on other occasions as well? A. Yes.

Q. What other occasions, for example? A. Well, at the Hunt's Point Casino.

Q. On June 4th? A. On June 4th, and another occasion at 114th Street, the Star Lyceum.

Q. Royal Lyceum? A. Royal Lyceum, and down at Forward Hall, East Broadway.

Q. Was that June 14th? A. Yes.

Q. Now, at the meeting on May 18th, how far were you, where were you standing with reference to the speakers' platform, at the time Miss Goldman delivered her address? A. I was standing on her right.

Q. How far from the platform? A. About twenty-five feet.

Q. Could you hear her plainly? A. Yes.

Q. Could she be heard in all parts of the auditorium? A. Yes.

Q. How many people would you estimate to have been present on that occasion in the hall? A. Four or five thousand. That is all they could get into the place.

Q. Could you hear practically everything that Miss Goldman said? A. Yes.

Q. You heard Miss Goldman dictate to the last witness who was on? A. Yes.

Q. Did she speak as rapidly as she did on the evening of May 18th, as rapidly as she dictated in the court a moment ago? A. Why no——

Mr. Berkman: I object.

The Court: Wait a minute.

Mr. Berkman: On the ground that this witness has not proven himself an expert, or that he listened carefully to the dictation here a while ago.

By the Court.

Q. Were you in the court room when Miss Goldman a few minutes ago read from the article, and the stenographer, Mr. Randolph, stood here? A. Yes.

Q. Did you listen to it closely? A. Yes.

Q. And you were about twenty-five feet away from where Miss Goldman was talking the night of the Harlem River meeting? A. Yes.

Q. And are you able to say whether or not in answer—are you able to answer the question of the District Attorney?

Mr. Content: Yes or no.

A. Yes.

The Court: Then I overrule the objection.

Mr. Berkman: Exception.

The Witness: Why, she spoke much faster in the court room; she spoke about three times as fast as when she read a speech.

The Court: That is, when you say she read a speech, you are referring to the occasions when you heard her?

The Witness: Yes.

The Court: How many times did you hear her?

The Witness: I have heard her on a number of occasions.

By Mr. Content.

Q. Approximately, how many? A. About four non-conscription meetings.

Q. Did she, in dictating, speak more rapidly than at any of the four meetings you previously named in response to my question? A. Yes, sir.

Cross-examination by Mr. Berkman.

Q. You are also an expert in stenography? A. No, sir.

Q. You don't know anything about stenography? A. No, sir.

Q. And what particular way have you of judging whether Miss Goldman, when she was speaking on the platform, is different, that is, how much different from what she spoke here? A. Why, I could not quite catch her words where I was sitting then, over in that corner (indicating).

Q. You could not? A. No, sir.

Q. That would prove she did not speak as loud as in the other hall? A. Why, she spoke more distinctly at the hall than she did in the court room here.

Mr. Berkman: Naturally, the acoustics being better, I suppose.

Mr. Content: That has nothing to do with it.

Q. But you have no particular way of telling whether it was faster or twice as fast, or ten times as fast? A. My own idea of it.

Q. Generally, a general idea of it? A. Yes, a general idea.

Q. You were at the Harlem River Casino meeting? A. Yes, sir.

Q. You came with some other soldiers? A. No, sir.

Q. You came all alone? A. I came alone, sir.

Q. Were any other men from your regiment or company there? A. There were men from all regiments.

Q. There were men from all regiments? A. Yes.

Q. All regiments stationed in New York? A. In and around New York, I should say.

Q. You mean men from the various regiments? A. Why, there were some soldiers there, some sailors, some marines.

Q. I am speaking of soldiers, of soldiers and national guard, military? A. Yes.

Q. Were there members of the military there that evening at that meeting? A. Yes.

Q. Did they belong to your regiment? A. Yes, some of them.

Q. Did some of them belong to your company? A. No, sir.

Q. You came alone without any other members from your company? A. Yes.

Q. Did you know about the other members of your company coming? A. I think I did, coming out. I was not in uniform that night.

Q. You were not in uniform? A. No, sir.

Q. There were members of the military in uniform and out of uniform? A. Yes.

Q. Quite a number of them? A. I think there was.

Q. Do you remember any disturbance at the Harlem River Casino? A. No disturbance whatever, as I recall.

Q. Do you recall anybody shouting down from the galleries, interfering with the speakers? A. I noticed a bugler approach the stage and offer to hoist a flag, and it was refused by you.

Q. I beg your pardon, what is that? A. There was a bugler attached to the 14th Infantry of Brooklyn, approached the stage with a flag, and he demanded the right to hang it up, as there was none in the building, and he was refused.

Q. He spoke to me? A. Yes.

Q. Are you sure he spoke to me? A. I am positive.

Q. Where was I, sitting or standing on the platform? A. You were sitting on the left of Miss Goldman.

Q. On the left of Miss Goldman? A. Yes.

Q. Where was Miss Goldman? A. Sitting on your right.

Mr. Berkman: Certainly, I understand that. That don't indicate the position of either.

The Court: He means, what part of the platform was Miss Goldman.

The Witness: Why, they were sitting on the—towards the rear, I should say, as near as I can remember, it was some time ago.

By the Court.

Q. What time of the evening was this? A. Why, this was about 8.45.

Q. Had the speaking begun? A. Yes.

Q. Speaking was going on at the time? A. Yes.

Q. When the man with the bugle approached him, asking about the flag? A. Yes.

By Mr. Berkman.

Q. How did he approach me, was the speaker in front of me, or was I in front of the speaker? A. The speaker was in front of you.

Q. The speaker was in front of me? A. He got right up on the stage, and was stopped by the speaker.

Q. The speaker was in front of me? A. Yes.

Q. And a man approaching me, necessarily would have to pass the speaker first? A. Why, there was some lady stopped him, sir, and he said he demanded the right to the platform, and you said you would give him the platform, and asked him not to stay, and he didn't do it.

Mr. Berkman: That was a different man you are speaking about, the bugler.

The Court: You are both speaking about the bugler?

The Witness: Yes.

The Court: And then what happened?

The Witness: He was refused, so he only probably asked the chairman—I don't know really what he asked, but there was a disturbance, and I happened to notice men in uniform, and there was no non-commissioned officer, and I approached, as a non-commissioned officer, to find out the trouble, and so I overheard the conversation between this gentleman here and the bugler from the 14th.

Mr. Content: Mr. Berkman, you mean?

The Witness: Yes.

The Court: And the bugler.

The Witness: Yes.

The Court: And after what you saw happened, was the thing quieted down?

The Witness: No, sir, Inspector Myers came over——

Mr. Content: He is the police inspector?

The Witness: Yes, and asked me what the trouble was, and I didn't—I told him I didn't know, but would find out, and when I found out, the Inspector says, "Well, you

know, they don't have any use for any flag, anyway," he says.

Mr. Berkman: Now, that is all out of place.

By Mr. Content.

Q. Was the defendant present when Inspector Myers said that? A. Yes, sir, he was.

The Court: Only state what Inspector Myers said.

By Mr. Berkman.

Q. Excepting there was a disturbance—you didn't know there was any disturbance, you didn't see anything of the kind?

Mr. Content: I object to the form of the question, he didn't say that.

Mr. Berkman: He did, it is on the record.

The Court: What he said was—the jury, of course, can take their own recollection—was that there was no disturbance, except in connection with the bugler and with the flag. Is that right?

The Witness: Yes.

The Court: Was there a general disturbance in the hall?

The Witness: No, sir.

By the Court.

Q. Only this bugler incident? A. Yes, this bugler incident.

Q. Then did the bugler go off at that time, go off the platform? A. At my orders, sir, I told him who I was, and he immediately left the hall.

Q. You told him to stop? A. Yes, sir, I did.

Q. And he left the hall? A. Yes.

Q. After that, did the speaking go on, without any disturbance? A. It did, sir.

Q. And the meeting finished? A. Yes.

Q. In due course? A. Yes.

By Mr. Berkman.

Q. I am not clear in my mind about where the bugler was, was he on the platform? A. Yes.

Q. He was? A. Yes.

Q. How did he get there? A. Well, there is a short flight of stairs runs up.

Q. And anybody could come up those stairs to the platform? A. Why, they stopped him, but he got up anyway.

Q. He got up on the platform? A. He did.

Q. Was he in uniform? A. He was.

Q. And spoke to me? A. He did.

Q. And the speaking was going on all this time? A. Why, I think it was stopped off.

Q. Who was speaking at that time? A. I don't know.

Q. You don't know who it was? A. No, sir.

Q. Was I the speaker? A. No, sir, you were not the speaker.

By Miss Goldman.

Q. I want to ask the witness where I sat at that particular time when he stated Mr. Berkman was approached and refused—where was I? A. Sitting on the right.

Q. On the floor of the house or on the platform? A. No, sir, on the platform of the stage.

Q. Did you see me sitting on the platform? A. I did.

Q. At any time? A. I did.

Q. You heard me speak? A. I did.

Q. And you saw me sitting on the platform at any time before I spoke? A. Yes, ma'am.

Q. Were you on the platform? A. No, ma'am, I was not, I was not on the platform at the Harlem Casino, I was at some of the other meetings.

Q. You saw me from the body of the house? A. I did.

Q. Sitting on the platform, before I spoke? A. Yes, ma'am.

Miss Goldman: That will do.

By Mr. Berkman.

Q. Do you know, Mr. Silverman, whether my foot was injured at the time, at that time on the platform? A. I think your foot was injured at that time.

Q. It was? A. Yes.

Q. Do you remember a number of people around me, to protect me because of my injury then? A. That I can't recall. There was quite a number of people on the stage.

Q. There was quite a number? A. Yes.

Q. They were around me, so that they could not push me?

Mr. Content: How does he know that?

Q. Do you think it was possible for a perfect stranger to approach me, with several friends all around me?

The Court: Now, that is argumentative. He has told you.

Q. You are sure you saw Miss Goldman sitting on the stage? A. Positively.

The Court: He said that three or four times.

By Mr. Content.

Q. She sat on the stage at the June 4th meeting, too, didn't she? A. Yes.

Q. She sat on the stage at the Forward Hall meeting on the 14th? A. Yes.

By Mr. Berkman.

Q. And you swear you saw me sitting on the platform at all those meetings? A. At one meeting on 114th Street, I believe she came right down to the hall, and immediately commenced to speak.

The Court: When was that?

Mr. Content: That was the Royal Lyceum?

The Witness: Royal Lyceum.

EMMA JENTZER, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a special agent of the Department of Justice? A. Yes.

Q. Were you in May and June of this year? A. Yes.

Q. Did you attend a meeting held at the Harlem River Park and Casino in New York City, on May 18, 1917? A. Yes.

Q. Did you hear Emma Goldman speak? A. Yes.

Q. Could she be plainly heard in all parts of the auditorium? A. Well, where I was, she could be plainly heard.

Q. Where were you? A. On the steps, leading upstairs to the balcony.

Q. How far removed was that from the speakers' platform, approximately? A. I should say about fifty feet.

Q. Were you here before, while Miss Goldman was talking to the witness Randolph, who testified a few minutes ago? A. Yes.

Q. Will you state, in your opinion, whether she spoke as rapidly at the Harlem River meeting as she did in talking to Mr. Randolph? A. No, sir, not quite so rapidly.

Q. Did she speak loudly and clearly at the meeting? A. Very loudly and clearly and distinctly.

Q. And you could hear her fifty feet from the platform? A. Oh, yes.

JOHN C. DILLON, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. What is your occupation? A. Stenographer in the service of the New York City Police Department.

Q. You are not a police officer, however? A. No, sir.

Q. A stenographer appointed to the Police Department? A. I am a stenographer in the service of the New York Police Department.

Q. Are you a civil service appointee? A. Yes.

Q. How long have you been taking shorthand reports? A. Ten years, reporting meetings.

Q. Have you ever taken the speeches of Emma Goldman? A. Yes, on three different occasions.

Q. When? A. At a birth control meeting in March, 1915, at Carnegie Hall, and at the Hunt's Point Palace anti-conscription meeting.

Q. On June 4, 1917? A. June 4, and at the Forward Hall anti-conscription meeting.

Q. June 14, 1917? A. Yes, sir.

Q. In your opinion, about how many words a minute, on an average, does Miss Goldman speak when delivering a public address, at the times when you have been present? A. I never took her where she spoke above 125 words a minute.

Q. That is her average, in your opinion? A. Below that.

Q. And you were present at the Hunt's Point meeting? A. Yes.

Q. At that time, did she speak as rapidly as she did when she dictated to Mr. Randolph? A. She did not speak—when she dictated to the witness Randolph, in court to-day, she spoke about twice as fast as she does when she makes speeches.

Q. She is a loud, clear speaker? A. Very loud and clear, and very easy to take.

Q. Easy to take? A. Yes.

By the Court.

Q. You mean by that her enunciation is distinct? A. Very clear and distinct.

Q. You are not a policeman yourself? A. No, sir, I am a stenographer.

By Mr. Content.

Q. And the meetings you reported because you were directed to go and report them? A. Yes.

Q. You have no personal interest in the result of your dictation? A. None whatever.

(No cross-examination.)

JEROME MURPHY, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are an acting detective sergeant of the New York City Police Department? A. I am.

Q. What squad? A. Bomb squad.

Q. What is your shield number? A. 571.

Q. On the 15th of May, did you have under observation or surveillance the premises 20 East 125th Street? A. I did.

Q. At any time during that afternoon, did you see the defendants enter the premises? A. They did.

Q. Which one entered first? A. Mr. Berkman.

Q. About what time was that? A. About 1.45.

Q. Did Miss Goldman follow him some time later? A She did.

Q. About what time did she enter? A. About 2.15.

Q. Were you present when the United States Marshal entered those premises also? A. I was.

Q. When did he come, about? A. Around five o'clock, half past four.

Q. Were you present when the arrest was performed? A. I was.

Q. Did you stay behind later, and also see the various documents that were found in the possession of the defendants at the time of their arrest, and brought to the Marshal's office? A. I was.

Q. And you have been present in court while the different exhibits that were testified to, were taken out of the boxes, and offered in evidence? A. I was.

Q. And you assisted Sergeant Barnitz in arranging these different exhibits? A. Yes.

Q. And does your testimony in any way differ from his? A. It does not.

Mr. Berkman: No questions.

Mr. Content: Now, Mr. Berkman, I appreciate you are not a lawyer, but I spoke to Mr. Weinberger about this part of the case; it is part of the Government's proof that on the 18th of May, 1917, the President issued a proclamation fixing June 5, 1917, as registration day, and I stated to Mr. Weinberger that if the defense would not concede that, I might have to bring someone from the State Department in Washington to testify that the President issued that proclamation.

Mr. Berkman: We concede that.

Mr. Content: Let the record then read: It is conceded that on the 18th day of May, 1917, Woodrow Wilson, President of the United States, issued a proclamation, as provided by Section 5 of the Selective Draft Act of May 18, 1917, fixing June 5, 1917, between the hours of 7 A. M. and 9 P. M., as the date upon which all persons of conscriptable age, or rather, all persons between the ages of twenty-one and thirty, both inclusive, except those exempted, should register in the precincts wherein they may have their permanent homes.

The Court: That is conceded?

Mr. Berkman: Oh, that is the fact.

Mr. Content: And the issuance of the proclamation.

Mr. Berkman: You mean the signing of the Conscription Bill?

Mr. Content: No, the Court will take judicial notice of that, but merely that the President, in accordance with the bill, issued a proclamation fixing June 5, as registration day.

Mr. Berkman: Oh, yes.

Mr. Content: Between the hours of 7 A. M. and 9 P. M., calling upon all male persons, who had attained their 21st birthday, but not yet attained their 31st birthday, except members of the regular army, the navy, the marine corps, the national guard, and naval militia, officers' reserve corps, and enlisted reserve corps, in the active service of the United States, to register in the precincts wherein they may have their permanent homes.

Mr. Berkman: Yes.

The Court: Very good.

Mr. Content: The Government rests.

The Court: Let that be what the President has lately called, the Selective Service Law.

Mr. Content: The Selective Service Law of May 18, 1917. The Government rests. Do you want to move to dismiss on the ground the Government has not made a case —I have not read a couple of exhibits to the jury, I was so anxious to get through, and with the permission of the Court, I shall read——

The Court: Well, proceed then.

Mr. Content: Will you note that this should have been read before the Government rested?

The Court: Yes, the stenographer will note that.

(At this point Mr. Content read from Government's Exhibit No. 35.)

Mr. Content: Now, I wish to read the speech of Alexander Berkman and Emma Goldman at the meeting on June 4, 1917, which was referred to as the Hunt's Point meeting.

Mr. Berkman: I supposed it would be the customary thing to put in the defense after the State closed its case, but the defense is perfectly willing to have——

The Court: No, you have a misapprehension there. Mr. Content, or you, or any of the parties to the suit, after an exhibit is in, may read the exhibit. He announced he would rest, and after he rested he stated that in the desire to put in some of these routine matters of proof, he forgot to read the exhibit, and he is simply doing what he is entitled to do.

Mr. Content: This also was received as Government's Exhibit No. 33.

The Court: Yes.

Mr. Content: I am reading now from that portion of Exhibit No. 33 which contains the transcript of the speech of Alexander Berkman (reading).

Mr. Content: The Government rests now.

The Court: Very well. The Government rests. Have you any motions, Mr. Berkman, or Miss Goldman?

(GOVERNMENT RESTS.)

Miss Goldman: We move to dismiss the indictment on the ground that the Government failed to show there was a conspiracy to tell people not to register; and I further move to dismiss the indictment on the ground that the Government failed to prove or bring evidence that the defendants Emma Goldman and Alexander Berkman advised people not to register; and furthermore, move for the dismissal of the indictment on the ground that the Government failed to show in any of the speeches read or literature in evidence, that the defendants Emma Goldman and Alexander Berkman in their writings, in their communications, told the people not to register.

The Court: Do you make the motion on behalf of both defendants?

Miss Goldman: Both defendants.

The Court: Motion denied, and an exception will be reserved to each defendant.

The Court: The defense may open.

Mr. Berkman opened the case to the jury on behalf of the defendant.

THE DEFENDANTS' CASE.

Mr. Content: I understand the opening was on behalf of both defendants?

Miss Goldman: Both defendants.

Mr. Content: Just for the purposes of the record, in order to protect myself on my direct case, I ask the Court to note that Mr. Pickler, the gentleman who was so busy that he requested the Court to let him answer a question when it was out of order, is in court at the present time.

Miss Goldman: We asked him to come.

JOHN REED, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Mr. Reed, what is your business? A. I am a newspaper reporter.

Q. A newspaper reporter? A. Yes.

Q. Is that the only work you do now, or did in the past? A. I have been a war correspondent, if you want to differentiate at all. I have also written books.

Q. Did you write a book on the war? A. I have written two books on the war, yes.

Q. You were also a war correspondent for a time? A. I was.

Mr. Content: I ask Mr. Pickler to withdraw from the room. He is making remarks about me at the reporters' table. I do not think it is fair. I ask him to withdraw until he is called as a witness.

The Court: There must be no remarks by any of the witnesses to any persons excepting the persons concerned with the case.

Q. Mr. Reed, you were a war correspondent for what magazine? A. I was war correspondent in Europe, representing the *Metropolitan Magazine*, and the *New York World*.

Q. Representing the *Metropolitan Magazine* and the *New York World?* A. Yes.

Q. Were you war correspondent on various occasions in different countries? A. I was war correspondent for all the different European countries, all the belligerent European countries, and also in Mexico, before that.

Q. Were you in Mexico on behalf of the *Metropolitan Magazine?* A. And the *New York World*—the *Metropolitan Magazine* and the *New York World*.

Q. You wrote books on the war? A. Yes.

Q. How many years have you been a war correspondent? A. I was a war correspondent three years in succession.

Q. Mr. Reed, will you please tell us what is your impression, or the impression of people you associate with in the newspaper world and the magazine world, with regard to conscription and registration—are they different matters, or the same thing?

Mr. Content: I object.

The Court: Now, I will sustain the objection, and explain the reason why, so that it is perfectly clear to you. The opinion of any layman as to whether conscription and registration are different matters, is utterly immaterial. The jury will be instructed as to what the law provides in regard to registration, and be instructed, so far as may be necessary, as to what is meant by what has been called conscription, or what was recently called in the President's latest proclamation, the Selective Service Law, and in regard to the various documents and spoken words of the defendants which are in evidence. In

so far as the Court may or may not construe those words, it is for the jury to determine the meaning of those words; and the opinions by witnesses, as to whether or not there is a difference between conscription and registration, and for them to say what the difference is, are utterly immaterial and quite irrelevant. The subject is not irrelevant, but the opinion of a witness is irrelevant and immaterial, and for that reason I sustain the objection, and the defendants may each reserve an exception.

Mr. Berkman: Exception taken. But I am not quite clear about the ruling. May I ask the witness whether if he should read an article where conscription is repeated two or three times, would it lead him to believe that the same thing is meant by registration.

The Court: No, that is for the jury to say from all the facts and circumstances of the particular case in mind. In other words, no outside layman can construe the writings in the case. That is solely for the Court or jury, as the case may be, or for both.

Q. You have talked with members of the House of Representatives, and Senators, and Cabinet Members, about the Selective Draft Law? A. Yes.

Q. Did they speak about conscription, as if it was the same as registration?

Mr. Content: Finish your question.

Mr. Berkman: That is the question.

Q. Did they speak to you about conscription as if it was the same as registration?

The Court: That is excluded on the same grounds.

Mr. Berkman: Yes.

Q. Do you know whether there are not people who believe in registration, and who registered, and who yet opposed conscription? A. Yes.

The Court: That is also excluded. Strike out the answer as immaterial and irrelevant.

Q. Were you at the Harlem River Casino? A. No, I was not.

Q. You were not at that meeting? A. No.

Q. Do you remember the mass meeting in Hunt's Point Palace, June 4th? A. Yes.

Q. Were you there? A. Yes.

Q. Did you notice any disturbance at that meeting? A. Yes, I did.

Q. Do you know there was some disturbance—was the disturbance created by anyone in the audience? A. Yes, it was created, the two times I saw the source of the disturbance. It was created by soldiers.

Q. It was read here from the stenographic minutes of the meeting at the Hunt's Point Palace, that during my address—were you present in Hunt's Point Palace when I was on the platform? A. Yes.

Q. It was stated that during my address an electric bulb, and other things, were thrown on the platform from the gallery—did you see them thrown? A. Yes, I saw both electric globes that were thrown at that time during your address.

Q. Who threw them? A. A soldier.

Q. You did not see any one of our own people throwing anything at the speakers? A. No, I didn't see anything of that.

Q. I mean the audience was peaceful and well behaved, with the exception— A. Well, the audience began to get mad as the second globe was thrown.

Q. Naturally. A. But nothing was done.

Q. Did the police try to prevent the soldiers from throwing things? A. After I saw the second globe thrown, I went down to the captain of police, and I asked the captain—told the captain, at least, that

globes, light globes, had been thrown by soldiers from the gallery, and asked him if he would go and stop it, and he looked at me, and after a while he turned his back said, "I will see about it."

Q. Did he see about it? A. I don't know whether he saw about it or not, but as I was coming out of the hall afterwards, the captain of police was standing at the door, and he fixed me with his eye and said very clearly, "So you are the young man that said you saw two light globes thrown on the stage," and I said, "Yes," and he said, "I have been up there looking about it, and all I can find out was that one had been thrown," and I said, "I beg your pardon, I am sorry to have made a mistake," and went away.

Q. You heard my speech at the Hunt's Point Palace? A. Yes.

Q. Did you hear me speak about registration, or about conscription? A. I heard you speak about—I heard you advise people to resist conscription, as I understand it, and heard you refer to registration as the undertaker.

Q. I said that registration was the undertaker? A. Yes.

Q. Did I say they should resist registration? A. No.

Q. You did not hear me advise them not to register? A. No.

Q. Did you hear me advise them not to register on any other occasion? A. No. Two days before your meeting, I came up, it was in my capacity as a newspaper reporter, and I asked you privately, not for publication, whether you were going to advise your people against registration or not. You have known me a long time, and you can trust me, and you told me at that time you were not going to advise your people not to register.

Q. Do you remember an occasion upon which President Wilson sent for you to come to Washington? A. Yes, sir. Do you want me to——

Mr. Content: No, wait until the next question.

Q. Was that to consult you upon some political or social matters?

Mr. Content: If he answers yes or no, I don't object.

The Court: I don't see why it has any bearing, but——

A. I would rather explain it.

Mr. Content: No, I won't object if you answer yes or no.

The Witness: Well, yes, then.

Q. To secure your opinion on certain matters? A. Yes.

Q. Was it with regard to the Mexican situation?

Mr. Content: Objected to as having nothing to do with this case.

The Court: Not the slightest. Sustained.

By Miss Goldman.

Q. As a newspaper man, have you been reading the magazine *Mother Earth?* A. I have been reading it as a private citizen.

Q. How long have you been reading *Mother Earth?* A. About five years.

Q. May I ask you whether, in reading *Mother Earth,* you can tell the Court and jury as regarding the attitude towards war and militarism?

Mr. Content: I can't see that his opinion of what he read in *Mother Earth* has anything to do with this case.

Miss Goldman: He can explain things.

The Court: The best evidence is the article, if you want to prove the point that you indicate, by merely putting in any selection of representative articles, but his conception

of them is immaterial. You can put in as far back as you want to, as many or as few as you deem advisable, and that series of articles, if so put in, will thus disclose to the jury whatever their contents are.

Miss Goldman: Very well. Exception taken.

Q. You say you were at the meeting at the Hunt's Point Palace? A. Yes.

Q. Were you close enough to see what was going on on the platform? A. Yes.

Q. Did you see me sitting down on the platform until I began to speak? A. My recollection is that I did not see you sitting on the platform at all until after then.

Q. Until I came to the platform to speak? A. Until you came to the platform to speak.

Q. Could you refresh your memory, and tell the Court at what particular moment I got to the platform to speak, approximately?

The Court: You mean in time, or with reference to some fact.

Miss Goldman: No; not the time; in reference to the disturbance at the meeting.

A. I was just going to say it seems to me you came to the platform to raise your hand and ask the audience to be quiet. I am not sure about that, but I think that was when it was. I know you did, but I don't know whether that was upon the occasion of your coming to the platform or not.

Q. Up until that time you would have been able to see me if I had been sitting on the platform? A. Yes.

Q. So that I was not sitting on the platform? A. To the best of my recollection you were not.

Q. You stayed in the meeting until the end? A. I stayed in the meeting until the end.

Q. Then, was it your impression that when I began to speak this disturbance was serious, or at its height? A. About then, I should say.

Q. And during and after the speech was the audience disturbing, or what happened? A. Well, during the speech there was no disturbance at all from the audience, except the soldiers who shouted, one from the back of the gallery and one from the left-hand gallery, looking toward the stage, or near the stage, who shouted things, and something was thrown: but I did not—I was at that time not in the same position I had been when Berkman was speaking, or began speaking, and I did not see what was thrown, and could only hear the shouts from the gallery, meaningless shouts from the gallery, and saw one of the shouters, the soldier in the back of the gallery. The other shouter I did not see.

Q. Then, during my address, and after, the meeting adjourned quietly and peaceably? A. The meeting adjourned quietly, all except the plain clothes men and soldiers, who remained, on the stage, the soldiers shouting, and Sergeant Silverman and the plain clothes men grabbing and hustling an old lady who was handing out a leaflet, and calling her names, and hustling her away, these detectives.

Q. May I ask if Sergeant Silverman was in plain clothes? A. I did not see Sergeant Silverman that night.

> Mr. Content: He was in uniform that night. The Government will concede on that night Sergeant Silverman was in uniform.

Cross-examination by Mr. Content.

Q. Did you see me downstairs when you came down to complain to the police captain? A. No; I don't remember seeing you.

Q. I had crutches that evening. A. I don't remember seeing any.

Q. Isn't it a fact that the police captain went right over to the Second Deputy Police Commissioner, Lord, and reported what you told him? A. No; it is not a fact. He gave me a look, and went away and left me.

Q. Wasn't I right there when you were talking to Mr. Lord? A. I don't remember seeing you.

Q. Don't you remember Commissioner Lord and myself making an effort in some way to stop the disorder? A. I don't know; maybe it was so; but I did not follow it.

Q. Have you ever been convicted of a crime? A. No, sir.

Mr. Berkman: Objection.

Q. Were you convicted of an offense in Paterson, New Jersey?

Mr. Berkman: I object.
The Court: Overruled.
Mr. Berkman: Exception.

A. I was working on the picket line, and arrested; there was no charge given, and I was given thirty days, and upon the appeal I was let out. There was no prosecution for the appeal—in other words, I was dismissed immediately.

Q. You say on the appeal you were let out? A. Yes; on the ground there being no charge.

By Mr. Berkman.

Q. You were arrested in Paterson? A. Yes.

Q. By whom? A. By the police.

Q. On what occasion? A. On the occasion of the silk workers' strike in Paterson.

Q. How long ago? A. I think it was 1912 or 1911; I don't remember the exact year.

Q. On the occasion of the silk workers' strike? A. Yes—1913.

Q. Were you there in connection with some newspaper or magazine work? A. I was there as a reporter.

Q. How did you happen to get arrested? A. I was walking down the street in front of the mills, and I had on my old clothes, and the police came along and told everyone to get off the street—no martial law had been declared and there was no rioting—across the street, and I walked down the street, talking and looking around, and the police came and told me to go back, to get off, and I was arrested.

Q. That was your crime in Paterson? A. I asked what the charge was in court, and I was told, "Thirty days."

By the Court.

Q. What paper were you working for at the time? A. I was a reporter for *The Masses Magazine*, New York, and the *Evening Globe*.

The Court: What is *The Masses Magazine?*

Mr. Berkman: That was a socialist magazine.

By Mr. Content.

Q. That was a socialist magazine? A. Yes.

By the Court.

Q. You were not then reporting for the *New York World?* A. No, sir.

Q. Nor for the *Metropolitan Magazine?* A. No; although I did write a story of what happened to me in Paterson for the *Metropolitan Magazine*, and they printed it.

Q. Did you go there on any other business? A. No, sir.

By Mr. Berkman.

Q. Were you at that time in the employ of the *Evening Globe?* A. Yes.

Q. A reporter on the *Globe?* A. Yes.

Q. And the article that you wrote was also published in the *Metropolitan Magazine*, on the silk workers' strike? A. Yes, sir; "The Silk Workers in Prison" was the title of it, I believe.

LINCOLN STEFFENS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Mr. Steffens, where do you reside? A. New York.

Q. Are you always in New York? A. Not always; no.

Q. What is your business? A. Reporter and correspondent, magazine writer.

Q. War correspondent and magazine writer?

The Court: He said reporter, correspondent and magazine writer.

Q. For what magazines do you write? A. Well, *Everybody's, McClure's*, the *American*——

Q. You write on social questions, and war? A. Social questions, war, politics, business.

Q. When you speak about conscription do you mean registration?

Mr. Content: Objected to as immaterial and irrelevant.

The Court: Objection sustained on the same grounds heretofore stated.

Mr. Berkman: Exception.

The Court: That will be an exception to both defendants.

Q. Do you know about a paper called *The Blast?* A. Yes.

Q. Do you know whether that paper was first published in San Francisco? A. So far as I know, it was; yes.

Q. In connection with some labor matters? A. Yes.

Q. Well, I suppose, probably being out of the country, perhaps you have not heard about the two numbers of *The Blast* being published in New York; have you heard about that? A. No, sir.

Q. You have been out of the country recently? A. Yes.

Q. May I ask where you were? A. Russia.

Q. Do you think such a trial would be possible in Russia?

Mr. Content: Objected to as incompetent, irrelevant and immaterial, and improper.

Mr. Berkman: Not at all.

The Court: Sustained.

Mr. Berkman: Exception.

By Miss Goldman.

Q. Mr. Steffens, would you be good enough to tell the Court how long you have known me? A. Well, I reported the first speech you made, I think, in public, in Union Square. I don't like to tell you how long ago.

Q. May I tell you then? A. Yes.

Q. That was in 1893. You have met me, and heard me speak on a number of occasions since? A. Yes.

Q. Have you at any time, in public, heard me say that I would use violence? A. That you would use violence? No.

Q. You have always known me privately, have you not? A. Yes.

Q. In our private discussions about different social matters, and matters of importance, can you

recall hearing me say that I would use violence? A. No; always to the contrary.

Q. Have you ever heard me say I would tell others to use violence? A. As to violence, well, I have heard you say that you were opposed to violence and force.

Q. You have heard me speak on the question of war and militarism? A. Oh, yes.

Q. Will you be good enough to tell the Court my position towards war and militarism? A. You have always been opposed to it.

Q. Do you know the magazine *Mother Earth?* A. Yes.

Q. May I know how many years you have been reading it? A. Well, I think I have read it ever since the first number.

Q. Have you at any time in the magazine read my urging people to commit violence?

Mr. Content: Objected to, as the magazine would be the best evidence.

The Court: That comes under my previous suggestion. Objection sustained. Articles may be introduced, and will speak for themselves.

Q. Then, in your conversations with me, your definite impression was that I neither believed in violence or urged other to commit violence? A. I have always been very clear on that.

Mr. Content: No questions.

By Mr. Berkman.

Q. You have known me for some years? A. Yes.

Q. You met me in California and other places? A. Yes.

Q. It has been mentioned that there is a conspiracy between *Mother Earth* and *The Blast.* From your knowledge of me, and from your knowl-

edge of Miss Goldman, would you believe we would get into any kind of a conspiracy?

The Court: That is not a permissible question.

Mr. Content: That calls for a conclusion.

Mr. Berkman: No.

Q. Would you, knowing the character of both defendants, would you believe that it is possible for us to be parties to any conspiracy?

Mr. Content: Objected to.

The Court: Sustained.

Mr. Berkman: May I ask——

The Court: You may asked him if he knows your reputation for truth and veracity.

Q. Do you know my reputation for honesty and frankness? A. Yes.

Mr. Berkman: I don't want the reputation for that, truth and veracity.

Mr. Content: Ask him does he know your reputation for truth and veracity?

Mr. Berkman: It is beneath my dignity to ask such a question.

Mr. Content: That is the way to prove a character witness.

Mr. Berkman: I don't need a character witness. May I ask what his opinion is of anarchism?

Mr. Content: Objected to.

The Court: We will read it, certainly, if Mr. Steffens ever feels disposed to write an article on the subject, but at the present time it is excluded.

Q. Two persons holding similar opinions on the same social questions may present them—would that constitute conspiracy against conscription?

Mr. Content: Objected to. Mr. Steffens is not a judge of that.

The Court: Sustained.

Mr. Berkman: Exception. That is all.

CHARLES PICKLER recalled by the defendants.

Direct examination by Miss Emma Goldman.

Q. Mr. Pickler, have you known me before the time when you took my first speech in Hunt's Point Palace? A. I never had the pleasure of meeting you before, Miss Goldman.

Q. Do you know my work? A. I did not, except by newspaper reports.

Q. Are you in sympathy with the work? A. No.

Q. Are you an anarchist? A. No.

Q. You are a public stenographer? A. Yes.

Q. And you are connected with what company? A. None.

Q. How did you happen to come to the Hunt's Point Palace to take the stenographic notes? A. I was employed by the S.S. Company to go there.

The Court: They are a stenographic company, are they?

The Witness: No, sir.

The Court: What are they?

The Witness: They are what you call employers of shorthand reporters.

Q. Then, you came there without any knowledge of either the personnel of the speakers, Miss Goldman and Alexander Berkman—you knew nothing about them before? A. Absolutely nothing, Miss Goldman.

Q. You came there in your capacity as a stenographer? A. Merely as a shorthand reporter.

Q. Without any affiliations with the defendants? A. Absolutely opposed to them.

Q. How many words a minute can you take, Mr. Pickler? A. Miss Goldman, that is a hard question. But, I imagine, inasmuch as I have always succeeded in making a satisfactory report, that my speed will perhaps extend up to 225 words a minute.

Q. How many words a minute—wait, I beg your pardon— A. (Continuing) That is, easy work, ordinary, colloquial language.

Q. Now, you have also taken notes at another meeting of the addresses made by myself and Mr. Berkman, have you not? A. Yes, Miss Goldman.

Q. Will you be good enough to tell the Court what meeting that was? A. I reported two meetings. I had the pleasure of listening to you, Miss Goldman, once at the Hunt's Point Palace, and the next one was at Forward Hall, although, as I said before, I do not care at all for your principles.

Q. How many words a minute do you think I am speaking? A. When you reach the peroration, I have no doubt at all, Miss Goldman, that you speak at least 200 words a minute.

Q. Do you think it would be possible for anyone to take my speeches standing up on a table without any support for the book and take it accurately? A. How fast can this person write, and what experience has this person had?

Q. Well, supposing he writes from 100 to 125 words a minute? A. No, and because—I would say, Miss Goldman, it was absurd to assume such a person could report you or anyone else under such circumstances.

Miss Goldman: I think that is all.

Examination by Mr. Berkman.

Q. When did you first see me? A. At the Hunt's Point Palace.

Q. At the Hunt's Point Palace, June 4th, 1917? A. Yes.

Q. Did you ever see me in your life before? A. Never.

Q. And that was the first time you saw Miss Goldman in your life? A. Yes.

Q. You are opposed to our ideas? A. Oh, absolutely.

Q. You have no special reason for not telling the truth? A. Oh, no, no, no—nothing has been paid to me.

Cross-examination by Mr. Content.

Q. Mr. Pickler, what is your estimate of the number of words a minute Miss Goldman spoke at the Hunt's Point Palace? A. Why, varying from 125 to 200 words a minute.

Q. Didn't you say this morning, in response to Miss Goldman's question, that she always spoke at 200 words a minute? A. Oh, no; Miss Goldman is a very deliberate speaker, as a rule.

Q. Very deliberate? A. Very deliberate.

Q. Her enunciation is distinct and good? A. Fine.

Q. She has a good speaking voice? A. Wonderful.

Q. As good as any woman you ever met? A. I think she is the best speaker I ever met.

Q. Now, if she spoke at the rate of 200 words a minute, how did you have time to observe that a lemon was thrown on the stage or any character of missile? A. I did not say she was speaking at 200 words a minute when the lemon was thrown on the stage.

Q. What did you say this morning, when you were cross-examined, over my objection, by Miss Goldman? Didn't you introduce some remark that Miss Goldman speaks 200 words a minute? A. I may have said this, that at times, when Miss Gold-

man has reached a peroration, a climax, she speaks at least 200 words a minute.

Q. Do you mean to say you used the word "peroration" or "climax" in your testimony this morning? A. No, sir.

Q. Didn't you say this morning, as a matter of fact, didn't you interject this, the statement that Miss Goldman speaks at the rate of 200 words a minute? A. I may have.

Q. You seem to have some personal interest in this case, have you? A. None at all.

Q. You seem to have some personal animus against me. A. I beg your pardon, Mr. Content, I have the very highest respect and liking for you, you are a courteous gentleman in every way.

By the Court.

Q. If I understand you correctly, by peroration or climax, do you mean the end of the whole speech or at various times during the speech, when the climax is reached? A. I mean, your Honor, this: Naturally a woman of Miss Goldman's temperament, addressing a public audience, at times reaches a stage in her mental operations, when she begins to think rapidly, and as a result she begins to speak rapidly, and that may have happened fifteen or twenty times; and it means this, that the one who is reporting her must always have the capacity to report up to the maximum of her speed.

Q. And then, at other times, you think the average whould be down to 125? A. Oh, your Honor, at times, I do not suppose Miss Goldman's speeches would exceed 100 words a minute.

Q. Then, what it all comes down to is that depending upon the speaker's personality—in this instance Miss Goldman—there is a peroration a number of times, before he has finished the speech? A. Oh, yes, your Honor.

Q. And that is generally true of all speakers? A. Yes, your Honor.

Q. And it runs in this way, if I gather your testimony correctly, from around 100 words a minute when she is deliberate, and after that reaches 125, and then reaches 200, when the climax or peroration is indulged in? A. Yes, your Honor.

By Mr. Berkman.

Q. Did I understand you that your entrance into this matter was in the interest only of fair play? A. Why, certainly, that is all.

PAUL MUNTER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. Mr. Munter, you are a public stenographer? A. Public stenographer, and also official stenographer to Hon. Peter B. Olney, referee in bankruptcy.

Q. How long have you been a stenographer? A. About twenty years.

Q. How long have you known me? A. Why, I guess four or five years, Miss Goldman.

Q. You say four or five years? A. Yes, about that.

Q. Have you done public—have you reported my speeches or lectures? A. The first important work that you engaged me to do was when you engaged me in the spring of 1914 to report a series of lectures on the modern drama—I believe about twenty in number. Since then I have had, in all, I should say, about ten of your public addresses, at meetings of a political character, so to speak.

Q. I understand you are considered a champion stenographer? A. No, I consider myself a good

stenographer. I have passed number one in the examination for the Supreme Court, in Westchester County, last year, with a rating of 94, so I consider myself a competent stenographer. There are better men—Mr. Pickler is one of them.

Q. Did you find it difficult to take me in my lectures and speeches? A. Harder than most of the persons I have had to report.

Q. It would therefore require an expert stenographer to accurately report my speeches? A. Well, to put it a little modestly, it would require an experienced stenographer, who had had considerable experience in doing public work.

Q. You said you reported a series of lectures on the social significance of the modern drama? A. I believe that was the title.

Q. They were lectures, not speeches? A. No, they were what would be termed in the vernacular, high-brow stuff, a little different kind of language from what you use in political speeches.

Q. Will you please tell the Court whether the lectures you found in those lectures that it was difficult to take me? A. Yes, I can say they were about the most difficult I ever had to take, because you speak easily, you recall many things, and you seem to know all about your subject, and you delivered them at a fairly uniform rate of speed, about a hundred and eighty words a minute, which is very difficult to keep up.

Q. You say you have also reported public speeches, and at meetings? A. Yes.

Q. How did you find taking the speeches then?

Mr. Content: You mean your speeches?
Miss Goldman: My speeches.

A. Well, I would say that you were a little faster than the last witness said. I do not think you ever went lower than 150 words a minute, and I agree with him that your faster moments, which are rather frequent, in them you go up well beyond two hundred words a minute.

Q. Then you can say that unless one is accustomed to taking speeches, public speeches, and being at the same time one who also knows the English language well, that it would be difficult for him to take my speeches accurately? A. Yes.

Q. If you found it difficult to take my speeches accurately, may I ask you if at these lectures you took your stenographic notes when you were standing up? A. No, I have a very comfortable, square table, to sit at.

Q. And you found it difficult even then to take the lectures? A. Yes, it kept me busy.

Q. In your estimation, would it be possible for anyone to report a speech of mine accurately, standing on a table, without any support for his book? A. Well, I dare say there are people who can—I know I cannot.

Q. You could not, as an expert stenographer? A. No, I could not guarantee I had taken three-quarters of what you said in that manner.

By Mr. Berkman.

Q. Mr. Munter, you have taken rather hard stenography, for instance, have you ever taken stenography for patent and technical evidence? A. Very many years.

Q. Good speakers, and all kinds, fast and slow? A. Yes.

Q. And you, as an expert, were employed to take such evidence? A. Yes.

Q. You are thoroughly experienced? A. I consider myself so, yes.

Q. And you have difficulty frequently in taking Miss Goldman's speeches? A. Yes, indeed.

Cross-examination by Mr. Content.

Q. You are paid to take, on behalf of the defendants, stenographic notes of just what occurs at this trial? A. Yes.

Q. You have seen Government's Exhibit No. 32? A. Yes.

Q. That was the paper on which his Honor asked the witness to write for him those three different words? A. Yes, I glanced through it rather hastily.

Q. Take a good look at it (handing same to witness). There is no similarity between any of those three words, in shorthand? A. Not the slightest.

Q. They could not be confused by a good stenographer, I mean in transcribing his notes? A. I should say they could not be confused by an amateur.

By the Court.

Q. Your answer is that they could not be—to get the counsel straight—they could not confuse an amateur, and could not confuse you? A. Yes.

Q. In transcribing the notes into typewriting? A. That is what I mean.

Q. That is right? A. Yes.

Q. Were those three separate symbols, if I may call them such, on Exhibit 32, correctly translated by the words, "register," "conscription," "violence"? A. Yes, your Honor.

Q. Were you at any of these meetings that have been spoken of here, the Hunt's Palace, or the Harlem Casino? A. No, but I was called on to report the one at the Hunt's Point Palace, and because of not being able to take it, I turned it over to the S. S. people, who engaged Mr. Pickler.

Q. You turned it over to the S. S. people, and they hired Mr. Pickler? A. Yes.

Q. But you were not there yourself? A. No, sir.

Q. So it follows, obviously, that you did not hear either of those speeches? A. I did not.

(Whereupon the further trial was adjourned to July 5, 1917, at 10 o'clock A. M.)

New York, July 5th, 1917, 10 A. M.

Trial resumed pursuant to adjournment.

Present:
The Court, counsel and jury, same as before.

The Court: You may proceed, Mr. Berkman.

HELEN BOARDMAN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Miss Boardman, where do you live? A. 28 Grove Street, New York City.

Q. What is your occupation? A. I am a research worker, psychological research.

Q. For what organization or company do you work? A. For the Bureau of Educational Experiments.

Q. You are interested in educational matters? A. Yes.

Q. Were you born in this country? A. Yes.

Q. Were your parents born here? A. Yes.

Q. When did your folks come to this country? A. About the year 1640.

Q. You are a good American? A. Yes.

Q. Were you present at the Harlem Casino meeting, the Harlem River Casino mass meeting on May 18? A. Yes.

Q. Did you hear Miss Goldman's speech? A. Yes.

Q. Did you hear Miss Goldman say, "We believe in violence and we will use it"? A. I did not hear that statement.

Q. Did you hear Miss Goldman make any reference to violence or the use of violence? A. None whatever.

Q. Did you hear Fraina speaking there? A. No, I couldn't hear that.

Q. Did you hear Miss Goldman advise or urge people not to register? A. No.

Q. Did you hear Miss Goldman give a reason why she would not advise people not to register? A. Yes.

Q. What was the reason given? A. She said that she did not believe in advising people to act —the substance of her statement was that she believed that every person should act according to the dictates of his own conscience. As I remember it, she made the further point, that she, herself, was not subject to registration, and for that reason also she would not advise people in regard to it.

Q. Did she say she would leave it to the conscience of each one? A. Yes.

Q. To use his own judgment? A. Yes.

Q. Did you hear Mr. Berkman advise or urge people not to register? A. No.

Q. And you did not hear Mr. Berkman advise or urge people not to register? A. No.

Q. Did you hear any other speakers that evening advise people or urge them not to register? A. No.

Q. Did any other speaker inform us that this was a matter of conscience, the people who believe in freedom of conscience? A. Well, the speakers that night, Mr. Berkman, I did not hear all the speakers at the meeting.

Q. I am speaking of Miss Goldman and Mr. Berkman. You did not hear either Mr. Berkman or Miss Goldman advise or urge people in any way not to register? A. No.

Q. Did you recently visit the offices of *Mother Earth?* A. Quite recently.

Q. Can you recall the date approximately? A. About June 7 or 8, I think it was.

Q. Approximately. I don't know the date myself. A. Yes.

Q. Did you see anybody else present there at that time? A. Yes.

Q. Did you see there the reporter who was here, interviewing Miss Goldman? A. Yes.

Q. Did you hear the reporter ask Miss Goldman for a copy of *Mother Earth?* A. I don't remember whether he asked for it, but I know I saw Miss Goldman give him a copy.

Q. Well, that was the June issue? A. Yes.

Q. Did the reporter ask Miss Goldman whether she would advise people not to register? A. Yes.

Q. You heard him ask her? A. Yes.

Q. What did she say? A. She replied she did not advise people in regard to registration.

Q. She replied she did not advise people in regard to registration? A. Except that she advised every person to act as he thought was right.

Q. As each person thought was right? A. Yes.

Q. Were you present at the meeting of the No-Conscription League on May 23rd? A. Yes, sir.

Q. Was it a mass meeting? A. No, sir.

Q. It was an informal meeting? A. Yes, sir.

Q. Where was the meeting held? A. At Miss Goldman's apartment.

Q. Do you know where her apartment was? A. I think it is on 139th Street.

Q. 139th Street, near Broadway. Do you recollect the special reason for calling that meeting? A. Well, I can't just say what the chief reason was.

Q. Do you remember we had a mothers' meeting for June 4? A. Yes, sir.

Q. Do you remember that that meeting of May 23rd was called to arrange for that meeting? A. Yes, sir.

Q. You remember originally we intended to have Madison Square Garden? A. Yes, sir.

Q. And the meeting of May 23rd was to arrange the mass meeting in Madison Square Garden? A. Yes, sir.

Q. Do you remember that we talked about the mothers' meeting? A. Yes, sir.

Q. Do you know the reason it was changed to a general meeting? A. Yes, sir.

Q. What was the reason? A. Because it was decided that merely a mothers' meeting would be to limit the attendance.

Q. And that only women would come? A. Yes, sir.

Q. If we called a mothers' meeting; we wanted men as well as women? A. Yes, sir.

Q. You remember we could not get Madison Square Garden? A. Yes, sir.

Q. And the meeting was changed to Hunt's Point Casino? A. Yes, sir.

Q. That is the June 4th meeting. Do you remember whether I was present at the meeting, the informal meeting of May 23rd? A. Yes, sir.

Q. Was Miss Goldman there? A. No, she was not.

Q. Do you know the reason she was not there? A. She was out of town, I think, in Springfield.

Q. Massachusetts or Illinois? A. Springfield, Massachusetts.

Q. Do you know whether any message was received from Miss Goldman at that meeting? A. A letter from her was read.

Q. It was read? A. Yes, sir.

Q. What did the letter concern; what subject directly? A. The subject of conscription and registration.

Q. And what did Miss Goldman say about registration?

Mr. Content: I object to it on the ground the letter is the best evidence.

The Court: The objection is sustained.

Do you recollect what the letter——

Mr. Berkman: Well, the letter is in evidence.

By the Court.

Q. You heard a letter read? A. Yes, sir.

Q. Who read it, do you remember? A. I am not certain, I think Mr. Sachs.

Q. Well, it was read, the letter was read? A. Yes, sir.

Mr. Berkman: I would like to know from the Court whether I can ask the witness if she heard that letter read?

Mr. Content: The letter is the best evidence.

The Court: Have you the letter?

Mr. Berkman: We have not. You remember, you instructed Miss Fitzgerald to get the letter from the District Attorney; the letter was lost, she could not find it. It seems to me that the letter disappeared, it was in the possession of the District Attorney.

Mr. Content: You have to prove that statement.

Mr. Berkman: I can't prove that.

The Court: Well, you may recall her later, after you prove that letter. You may suspend on this particular line and call her later on that.

Mr. Berkman: We will suspend with her just now.

The Court: Do you want to put Miss Fitzgerald on?

Mr. Berkman: Yes, sir. I want to ask Miss Fitzgerald if she looked for that letter, which she did.

Mr. Content: And could not find it.

Mr Berkman: And we want to put Miss Fitzgerald on the stand.

Mr. Content: Did she find the letter?

Mr. Berkman: She could not. We asked Miss Fitzgerald later for the letter, she could not find it, it was not there.

The Court: Then let Miss Boardman step aside until the formal proof is put in.

MARY ELEANOR FITZGERALD, a witness recalled on behalf of the defendants, having been previously duly sworn, testified further as follows:

Direct examination continued by Mr. Berkman.

Q. Miss Fitzgerald, do you remember the meeting of May 23? A. I do.

Q. It was originally a preliminary meeting? A. It was a preliminary meeting to the mass meeting of June 4.

Q. It was a preliminary meeting to the mass meeting of June 4? A. Yes, sir.

Q. Where was the meeting held? A. It was in the apartment of Miss Goldman, 603 West 139th Street.

Q. Was I present at that meeting? A. You were.

Q. Was Miss Goldman present at that meeting? A. She was not.

Q. Do you know where Miss Goldman was? A. She was lecturing at Springfield, Massachusetts.

Q. Was there any word received from Miss Goldman at that meeting? A. Yes, sir.

Q. Who received it? A. I received a personal note from Miss Goldman, and a statement enclosed with that letter, which I copied, and I was asked to have it read at the meeting of May 23rd.

Q. Was there a request that her statement be read at the meeting of May 23rd? A. Yes, sir.

Q. Did you copy the statement, and how? A. On the typewriter; I made a typewritten copy of it.

Q. You made a typewritten copy of the statement? A. Yes, sir.

Q. And what did you do with that statement; did you submit it to the meeting? A. It was read at the meeting.

Q. That statement was read at the meeting? A. It was.

Q. What became of that statement after the meeting? A. After it was read at the meeting, and the subject discussed, I took it with other papers and put it in my desk.

Q. You put it in your desk? A. Yes, sir.

Q. Until when? A. Until the day of the arrest, yours and Miss Goldman's arrest on June 15th.

Q. And what happened to this statement on June 15th? A. Well, the officer, McGee—I learned since I am in the courtroom, was the man who took it from my desk.

Q. Officer McGee? A. I did not know his name at that time; but since he was on the stand I recognized him as the one who took the materials from the drawer of my desk, and that statement with a few other documents.

Q. Was Officer McGee with Marshal McCarthy? A. Yes, sir.

Q. He took the statements? A. He took this statement of Miss Goldman's with other papers from a drawer of my desk, a typewriter drawer.

Q. You saw him take it? A. I did.

Q. You were standing right nearby? A. I was standing right by him; I asked for it, to give it to me, and he would not give it to me.

Q. What did he say? A. He said he would take everything they wanted.

Q. Did you see the statement since? A. I have not.

Q. The Court instructed you a couple of days ago to look through the packages taken from the offices by the District Attorney, by the Marshal? A. Yes, sir.

Q. Did you look for that statement there? A. I did.

Q. Did you find the statement? A. I did not.

Q. What has become of it so far as you know? A. It disappeared; it was not with the papers in that room.

Q. You did not find it there? A. I did not find it.

Mr. Berkman: Well, we demand that the statement be produced.

Mr. Content: I do not believe there is such a statement.

Mr. Berkman: I object to the District Attorney making such a remark.

The Court: I did not hear you.

Mr. Berkman: We demand that the statement be produced; that the Court directed Miss Fitzgerald to get among the papers taken by your officers, Marshal McCarthy and Officer McGee.

The Court: Have you the statement, Mr. District Attorney?

Mr. Content: All the papers are in that room; I am informed Miss Fitzgerald looked through them hurriedly.

Q. Were any officers with you when you looked for the statement? A. One of the officers for the courtroom went with me, I suppose; there was an officer unlocked the door, the two men were in the room.

Q. Did they help you look for the statement? A. They were in the room while I was looking. I spent half an hour looking through the papers; I found a basket of things that had some of the papers coming from my desk, but in that basket was

not the statement. I looked through the last package in the room; I spent half an hour in the room.

Mr. Berkman: We want the statement produced.

Mr. Content: You may want it, I haven't got it.

Mr. Berkman: Is the District Attorney quite sure the statement is not among the papers here?

Mr. Content: It is not among anything I have. I have never looked through these papers; I am perfectly willing to accord you any access you want to them.

Mr. Berkman: I want to call the attention of the Court to the fact that this is a most vital statement.

Mr. Content: You may look for it if you choose; I will not; I refuse to look for it myself.

The Court: There is no obligation on the District Attorney to look for it; my suggestion is somebody be assigned to Miss Fitzgerald as heretofore, and she can spend the whole day looking for it.

Mr. Content: There is no reason for destroying any papers.

The Court: Let me ask you a question. Now, as I understand it, your testimony is that the letter was received by you from the defendant, Miss Goldman?

The Witness: Yes, sir.

The Court: Was a letter and a statement enclosed from her, or was the letter the statement?

The Witness: A personal note to me; with a statement giving her position on registration that was to be read at this meeting. This meeting really was to discuss the position of the League on registration, besides arranging for the June 4th meeting.

The Court: Now, was this statement a physical, separate paper?

The Witness: It was separate from the little note, and then I copied it.

The Court: That was in her handwriting?

The Witness: That was in her handwriting.

The Court: What did you do with that personal note and the statement enclosed with that personal note?

The Witness: I copied the statement; I made a typewritten copy of her statement, and then I tore up the note, her original note and statement, too.

The Court: Then as the matter stands, you tore up the original note, and you tore up the original statement?

The Witness: Yes, sir.

The Court: So that they are not in existence by reason of your tearing them up?

The Witness: Yes, sir.

The Court: Now, you made a typewritten copy of this statement?

The Witness: Yes, sir.

The Court: Where did you make it?

The Witness: You mean where I did the work?

The Court: Yes.

The Witness: In the office of *The Blast*, 20 East 125th Street, on the typewriter.

The Court: What day did you receive this note from Miss Goldman, enclosing the statement?

The Witness: I think it was on the morning of the 23rd of May.

The Court: What hour was the meeting?

The Witness: The meeting was called for eight o'clock.

The Court: In the evening?

The Witness: In the evening.

The Court: Some time during the day you made this typewritten copy?

The Witness: Yes, sir. It was in the afternoon—after receiving the letter from Miss Goldman, I immediately made a copy, and I tore up her note and the original statement; I had my typewritten copy to be read at the meeting.

The Court: Now, after you read at that meeting that night, where did you go; I mean by that, did you go to the No-Conscription League headquarters?

The Witness: I stayed at Miss Goldman's that night.

The Court: You stayed at that apartment that night; when did you go to the No-Conscription League headquarters?

The Witness: The following morning.

The Court: Did you have the statement with you?

The Witness: I did.

The Court: Where did you put it?

The Witness: I put it in the drawer in the typewriter desk.

Mr. Content: I have been called upon to produce this letter. Before the trial began, it was last Saturday morning, around ten A. M., Mr. Weinberger, I think was their attorney then, and he called me up and he said he would have to serve me with a notice to produce a letter from Miss Goldman to Miss Fitzgerald. I said, he did not need to go to the trouble to serve a notice to produce anything, that anything that I had, he was welcome to. He asked me if I would look specifically for a letter from Springfield, from Miss Goldman to Miss Fitzgerald. I sent Detective Sergeant Barnitz, who is more familiar with the files than I am, and he could not find that letter. I never knew

about this copy of the statement. Mr. Weinberger asked me to produce a letter. Now Miss Fitzgerald says the letter is destroyed; that is what I have been looking for, and I have had Detective Sergeant Barnitz looking for, assiduously.

Now Mr. Berkman is requesting that a man in my physical condition should go to the room, go through the files when everything is at their access. We have nothing to hide. We are asked to produce a letter, and it now appears the letter was destroyed by the witness. I want you to understand I have made an effort to locate it in the files. I can't produce something I have not got.

Mr. Berkman: I did not mean the District Attorney himself should now look for it. I mean it should be done.

The Court: There will be no difficulty about it. Now you say that the drawer containing these different papers that you have outlined, was taken by a man that you know now as Officer McGee, who was on the stand the other day for a few minutes?

The Witness: Yes, sir.

The Court: Now you could recognize it at once, I assume?

The Witness: Yes, sir; I could.

The Court: There will be no difficulty at all. You can just arrange, Mr. Content, to assign somebody and allow Miss Fitzgerald to go through, as she had the opportunity to do the other day, and spend sufficient time in looking for it. Let her go through everything there is in the place.

Mr. Content: Absolutely.

Miss Goldman: If Miss Fitzgerald is taken off now to look for the letter, I would be unable to go on with her testimony, inasmuch as the most of the witnesses, at least

a number of them, have been present when the letter was read, and are corroborative; it is evidence that the letter was received, giving my position on registration. I really can't make it possible to go on with the testimony right now.

Mr. Content: If your Honor wants to receive secondary evidence on that, I suppose you will; I do not care much about it.

The Court: I do not want to delay the trial, nor do I want to deny the fullest opportunity to have any testimony produced in regard to any matter which is material to the defense, even though such production is not strictly in accordance with the technical rules of law. Now, I will let you ask this witness here any other questions as to the contents of that letter; then, when that shall have been done, at some convenient time before the trial is over—if it is necessary for her to stay, or this evening, she may search for this letter; if it is there, it is there; if it is not there, it is for the jury to say whether or not on all the evidence, such a copy was taken or was not taken; existed or did not exist.

Miss Goldman: That is satisfactory.

Juror No. 4: May I ask a question? The originals I understand from you, the statement and the letter were destroyed, the original?

The Witness: The note I received from Miss Goldman I did destroy, that is true.

Juror No. 4: The letter also?

Mr. Content: The statement was in Miss Goldman's handwriting?

The Court: The juror wants to know whether you destroyed both of them, the note and the statement.

The Witness: I did.

Juror No. 4: Except that you made a typewritten copy——

The Witness: When I made the typewritten copy, I simply tore up the letter and put it in the wastebasket; I did not know I was going to be a witness, because if it was necessary in this way, I would have saved everything. The only thing I needed was the statement; I had a copy of it; I tore up the letter and put it in the wastebasket, unfortunately.

Juror No. 4: That is your usual way with communications and letters that you receive; you tear them up——

The Witness: If I have no further use for it.

Juror No. 4: That is the way you transact your business; you tear up the originals after making a copy of the statement?

The Witness: No, it is not. I did not have any further use for it, at least I thought so at that time. When I made my copy to read to the meeting, I destroyed the other. I have that, what I thought it was necessary to keep, I kept.

Mr. Content: Will your Honor note I am only asked to produce the typewritten copy?

The Court: Yes.

By Juror No. 4.

Q. Did you have any particular reason for taking a copy and tearing up the original? A. The reason I took a copy was so that it could be easily read at the meeting; Miss Goldman's handwriting is not easy to read except for those who are used to her writing; it is not easy to read. I made a typewritten copy so as to be easy to read. She took specific instructions to have it read at the meeting, so far as I knew she was not to be present. She was at Springfield, Massachusetts, lecturing.

It was a perfect, natural thing, that I made a copy of the statement which was to be read, put it in shape so that it could be read easily and rapidly. I copied it, and then I kept a typewritten copy with my other documents.

Q. That is what I mean. The typewritten copy could be read easier than the original? A. Yes, sir.

Juror No. 10: Who read it at the meeting?

The Witness: I read it.

Juror No. 10: Are you acquainted with Miss Goldman's handwriting?

The Witness: I am, yes; sir. I did not understand I was to read it at the meeting. I did not know who might read it, but it was to be read there.

By the Court.

Q. Now, will you repeat, not your own conclusion of the letter, but repeat so far as your memory serves you, the wording of that letter? A. Well, I could not give you the wording of the letter from beginning to end, it was about a page——

Q. I mean, give your best recollection. A. It was a page and a quarter, a full typewritten page, the ordinary typewritten page, it was a full page, and about eight or nine lines on the other page; and in this way she starts, "Dear Friend" and in this letter she gave emphatically and definitely ——gave her position on the conscription.

Q. That is what I am asking you. A. I can give these lines of it: "That I do not advise or urge young men to refuse to register"; those two lines definitely and absolutely were written; and another statement following that, "As an anarchist, I could not do that, because that would be taking the same position as the Government, by telling someone to do this or do that; I refuse to advise

young men to refuse to register, it must be left to the individual."

Q. Was there anything in there about conscription? A. I do not remember whether there was. I do not think that there was anything about conscription; and then something regarding the meeting we were to hold, the mothers' no-conscription meeting.

Q. Your recollection is there was nothing about conscription? A. My recollection is there was nothing about conscription any more than about the meeting we were to hold on June 4.

Q. How many people were in that meeting at Miss Goldman's apartment? A. On May 23rd? Well, there were at least twenty-five people.

Q. Were they all known to you? A. No, sir.

Q. Most of them? A. No, sir.

Q. Do you know how they came there; what notice they got? A. I know their faces were familiar because they attended other meetings; I did not know them by name.

Q. Were all the faces familiar? A. No, not all the faces were familiar, because on that evening, May 23rd, I had sent out notices to the different anti-militaristic organizations, asking them to send delegates to the meeting, with the object of discussing the subject of registration.

Mr. Content: On what date?

The Witness: This was May 23rd. I sent out notices of the meeting to the anti-militaristic organizations, asking them to send delegates to this meeting, as we wanted to get together a little closer and discuss the work they were doing and the work we were doing.

The Court: Who acted as chairman at that meeting?

The Witness: I think Mr. Berkman was the chairman at that meeting.

The Court: Was there anything said as to who was there? Any question asked whether there were delegates from the blank blank association, or whatever the names of some of the organizations were?

The Witness: Yes, sir.

Q. Let us hear about that? A. There was a delegate from the Emergency Peace Federation.

Q. Who was there? A. Rebecca Shelley; Miss Boardman came as a delegate from the Union of Democracy—I do not know its full name—then there was a gentleman from Brooklyn, I understood he was representing five thousand conscientious objectors; he stated that evening his name was Pilkin, I think he gave us his name, I did not see him before.

Q. You knew, if I understood you correctly, that there were enough people who were strangers —those persons who were in the No-Conscription League—were to be present, or rather you expected a number of people? A. I asked these delegates; I never met them before.

Q. Do you know whether they knew Miss Goldman or not? A. Most of them did know Miss Goldman.

Q. Did you know? That is my question. A. Yes, I knew that several of them knew Miss Goldman. You mean the ones coming from the organizations?

Q. Yes. A. I knew some of them knew her.

Q. When you typed this statement and tore up the original, was it your intention to read the statement that evening? A. For me to read it?

Q. Yes. A. No.

Q. Was it your intention it should be read? A. Certainly.

Q. Did it occur to you at all that tearing up the original, some person at that meeting might want to see the original to make sure it was Miss Goldman who said it? A. It did not occur to me,

your Honor. In our organization our words are believed.

Q. I understood you—— A. Pardon me one minute. If Mr. Berkman or Miss Goldman or any of the others of the No-Conscription League would say they had a statement from Miss Goldman, our words would be taken, would be believed.

Q. I understood so, that is the reason I asked you the question. Were the invitations sent to some persons who were connected with other organizations as well as to your crowd? A. Our own crowd—the understanding from the meeting before was that there would be a meeting held—in the office, someone sent notices, someone notified in the meeting previous to May 18, and then what I told you, I did write notices to the different anti-militaristic organizations, asking them to send delegates, and they did.

Q. Have you got a copy of those notices, or did you keep a copy of them? A. Yes, there was a copy; I think that was also taken with the—I think that was one of the copies in the drawer of my desk.

Q. When did you write that, write the notices? A. How many days before the meeting of May 23rd? Well, about two or three days before.

Q. When was the 23rd meeting decided on? A. Well, I think from the—when we had a previous meeting, I know that was—when we had arranged it, we announced a date from the previous meeting of a meeting, and decided on a date.

Q. What do you mean by the previous meeting? A. On the 16th of May we had a meeting; that was before the 18th of May.

Q. The 16th of May; did you then arrange for the meeting on the 23rd? A. Well, I think we did, yes, sir.

Q. What was the meeting to be for? A. I do not remember whether—I know on the 23rd meeting we said we would meet on the 30th.

Q. I am not asking you about that. I am trying to find out why the meeting of the 23rd was arranged, by whom, and what for? A. It was arranged by the No-Conscription League.

Q. That does not mean anything at all to me. I mean the person? A. I sent out the notices.

Q. But somebody must have said something, or somebody must have moved, or somebody must have said that persons should be invited to the meeting of the 23rd of May? A. After the meeting of May 18th there were a few of the League members that met after the meeting, while we were at the——

Q. Where? A. In the room where we counted the collection, it was decided we would have another meeting.

Q. Was it then arranged as to date? A. I do not know whether it was then arranged as to date.

Q. Who arranged the date, do you know? A. I think I did. I think I just said we would have a meeting at a certain date.

Q. When did you arrange that? A. I can't tell just now how I came to make the date.

Q. When did Miss Goldman leave for Springfield? A. I think she was away at Springfield on May 22nd or the 23rd, as I remember it, and she left New York on the 21st. As I remember it, her dates were the 22nd and the 23rd.

Q. She left New York on the 21st then? A. I think so now.

Q. She left and was absent anyway on the 22nd? A. She was absent on the 23rd.

Q. Was she absent on the 22nd? A. She was absent on the 22nd, the 22nd and 23rd, to give a lecture at Springfield.

Q. Was she absent when the date was arranged for the 23rd meeting? A. I think she was. I think before she went away for her lecture—I am not sure, we arranged that meeting, and then I understood we were to have that meeting on the 23rd,

and she wrote me this letter, asking me to have it read.

Q. Are you able to state definitely when the date, May 23rd, was selected? A. By that do you mean do I know the very day on which it was arranged?

Q. The very day it was arranged to hold the meeting on May 23rd at Miss Goldman's apartment? A. Well, I am afraid I could not say just the day; I know it was just a few days before she left.

Q. You can't give us the date. Now, can you give us the occasion when it was decided to hold the meeting; where was it? When was it decided, or where was it decided? Was it decided at the meeting of the No-Conscription League, at the end of the Harlem River meeting? A. It was decided at the office of the No-Conscription League.

Q. When? A. Before she went to Springfield for her lecture.

Q. Did she state whether or not she was to be absent on the 23rd day? A. She did.

Q. Did she at that time write anything and give it to you? A. Not at that time; she wrote going on the train, or wrote after she reached Springfield, so that I got it on the 23rd day of May.

Q. May 23rd was the meeting in Miss Goldman's apartment? A. It was originally called for 125th Street, but on account of Mr. Berkman's foot, the people were sent down to Miss Goldman's apartment.

Q. You mean sent up? A. Sent up.

Q. By that I mean sent uptown? A. Yes, sir.

Q. Now, you stated Miss Goldman was away on the 23rd? A. On the 22nd and the 23rd, if my memory——

Q. Now, somewhere between the 18th and the 22nd the meeting was arranged? A. It was.

Q. You say it was arranged at the No-Conscription League office? A. Yes, sir.

Q. Who was present? Well, was Mr. Berkman there? A. I do not know whether he was—he was not. No, he was not.

Q. Was Miss Goldman? A. I think Miss Goldman and myself talked the matter over, and that night, that I talked with Miss Goldman about having some of the delegates over from these other organizations, coming in and talking over things with us, so that we would know what they were doing and they would know what we were doing.

Q. Was the meeting arranged by you and Miss Goldman? A. That meeting was arranged by Miss Goldman and myself, as I remember it.

Q. Anybody else? A. I do not remember anybody else now.

Q. How did you notify those persons who were present as delegates from these other organizations? A. By letters, by cards; some that were in the office were simply told by word of mouth there would be a meeting.

Q. Now, have you any recollection what these notices said? A. A meeting of the No-Conscription League will be had May 23, at 8 P. M., at—that is about all there was to it.

Q. There was nothing in the notice disclosing the nature of the business that evening? A. Nothing in the notice.

Q. What it all amounted to was a notice simply that the No-Conscription League would hold a meeting on May 23rd? A. Yes, sir.

Q. Now did the notice say to meet at Miss Goldman's house? A. No, sir. The notice said to meet at 20 East 125th Street.

Q. Did the people come there then? A. The people came up to the office at 20 East 125th Street, and there was a young man left at the office to send them to 603 West 139th Street.

Q. What was his name? A. Carl Newlander.

Q. Now, going back to the statement of which you made a copy, this statement enclosed in Miss

Goldman's letter to you; have you now stated in substance in response to the Court's question, all that that statement contained? A. You asked if I stated—I have stated in substance all that notice of Miss Goldman's—rather the statement, contained.

Q. Was there any reference in the letter to the Harlem River meeting? A. No, sir.

Q. Was there any reference there to the so-called mothers' meeting—is that correct? A. That is correct.

Q. Was there any reference in there to the meeting? A. No, sir; not that I know of. It was giving her position emphatically on registration, and it was—and about the matters of the No-Conscription meeting, we had planned for Madison Square Garden, and we were unable to get the Garden after it was promised to us.

By Miss Goldman.

Q. Miss Fitzgerald, you have known me for quite some time, have you not? A. Yes; Miss Goldman, I have known you for nine or ten years.

Q. You have corresponded with me on a number of occasions, have you not? A. I have.

Q. Isn't it a fact that my nearest friends even find it difficult to read my writing? A. Well, yes.

Q. Isn't it a fact that we can never send original copies of what I write by hand to a printer? A. That is true, you cannot.

Q. Isn't it a fact that whenever a statement is to be read it must be first typewritten? A. Absolutely.

Q. Then the reason for typewriting this statement which I wrote on the train going to Springfield——

The Court: You may ask about the statement which she received.

Q. The statement which you received, you received on the 23rd, did you not? A. That is my best recollection, I received it the day of the meeting held in the evening.

Q. Then the reason for typewriting the original was really the fact it is very difficult to read my handwriting? A. It is difficult to read your handwriting.

Q. Isn't it also true, Miss Fitzgerald, that whenever my original statements or articles are typewritten, isn't it a fact that the original is always destroyed? A. Yes.

Q. Now, Miss Fitzgerald, about my handwriting, do I write small or large? A. You write a large, strong handwriting.

Q. Do I use up little paper or a great deal of paper? A. You use a great deal of paper.

Q. Now, in the original statements or articles or whatever is sent to be read or to be published, you said that the main purpose, the main reason is my handwriting is difficult to decipher? A. Yes, sir.

Q. Let me also ask you, whether it is not also because it would take quite a large building to hold all the papers? A. That is true; our office is small.

Q. Then really you destroyed—— A. May I add something right here to the question—why, right here where I was asked wouldn't it take a large building, I wanted for the benefit of this jury to say, when he asked if it my custom to tear up all the things—it would take a lot of files and fill up the place to no purpose. I said to him, unless it was necessary to keep them, it was my custom to tear up things that we have no further use for, and I did keep a typewritten copy of what I felt we had use for. I felt you doubted my statement.

The Court: You can ask the question direct, Mr. Juror.

By Juror No. 4.

Q. This was not of enough importance, to retain Miss Goldman's original, was it, the original statement or the original letter; you disregarded that and you simply made a carbon copy, you made a typewritten copy? A. I made a typewritten copy. I stated I had no thought at that time I would have to be up on the witness stand to be cross-examined regarding the statement. If I thought of all of this I would have the original, I would have everything.

Q. May I ask you one more question? Why did you memorize so thoroughly certain lines of this letter in that regard? A. It was not memorized.

Q. Nothing occurred to you to do that thing? A. The purpose of her sending that statement back was to have it read at the meeting; it was her position regarding registration; I have given our position, and if there is——

By Miss Goldman.

Q. Miss Fitzgerald, have you stated here why the meeting on the 23rd was decided upon, why I suggested a meeting on the 23rd? I am not sure whether you did or not, because it is difficult to hear you back here. Have you stated it? A. I stated it was for the purpose of arranging this mothers' no-conscription meeting, and also for the League to clarify its stand or to make definite its stand on the subject of registration. I explained to the Court that previously I sent out notices to the different anti-militaristic organizations, so that their delegates would be present, and could all talk together on the subject.

Q. Now, between the 18th of May and the 23rd, or rather the 22nd, when I left for Springfield, did I or did I not talk to you on this issue? A. You did.

Q. Of my own stand? A. Yes.

Q. And can you approximately give the gist of our numerous conversations, what stand I took? A. I have in my statement to the Court; that is really the gist, that you were very emphatic every time we have discussed it, and in the statement that you sent from Springfield you said that you would not take it upon yourself to advise the young men not to register or to register, that it must be left to the individual, and insofar as you would not come under the—you would not be punished—if you did not come under the registration law, you would not take it upon yourself to tell other people what to do, that would be taking the attitude of the Government. No; Miss Goldman, that is as briefly as I can state, that is your statement at that time.

Q. Naturally, since you did not memorize everything, you can't give it verbatim. Now, this meeting took place on the 23rd and the statement was read? A. It was.

Q. Just a minute. In the note I wrote you, inclosing the statement, have you any recollection of what I said should be done with the statement? A. You asked me to make a typewritten copy of it and have it read at the meeting, which I did.

By Mr. Content.

Q. You destroyed that note? A. I did; I explained, Mr. Content, I tore up the original note.

By Miss Goldman.

Q. And then the letter was read? A. The letter was read.

The Court: Before you leave that letter, let me ask you a question.

The Witness: The statement was read.

The Court: Of course, the statement.

By the Court.

Q. I understand—if I am in error, I wish you would correct me—there was something in the letter to the effect that she was an anarchist, and that as to the question of registration the writer could not do that, that is to say, could not advise persons? A. Could not say do this or do that.

Q. I mean, could not do this or do that? A. Yes, sir.

Q. If I understood you correctly, it referred to the general position of the federation, not merely as to registration, but as to any other act having to do with the conduct of other persons? You understand the question? A. I do not.

Q. When you said Miss Goldman said, you recollect, as an anarchist, she could not say, or words to that effect, whatever it was, do this or do that, did that refer in the letter solely to registration, or was that a general statement? A. She was referring to registration in the sense as used, she was referring to the specific thing of registration.

Q. As you recollect it, the letter was, or the expression was limited to registration; that was a pronouncement of the general principle of anarchy? A. It was both; it was the principle of anarchism and also was used in connection with her statement regarding registration, advice on registration.

Q. If I understood you correctly, the principle is that there is not to be any advice or suggestion on any given subject? A. And no coercion.

Q. I said advice; coercion is another matter. A. You are asking me now as an anarchist on certain things.

Q. Yes, for what you have brought out before. A. As an anarchist, each individual must decide his own acts for himself. If your Honor will let me tell you this, there wasn't a day but what twenty-five or thirty young men came up to our office and asked her advice about registration——

Q. I did not ask you that. A. I want to tell you.

Q. Just confine yourself now directly to the stand that the League took. A. I would say there were some young men from the District Attorney's office came there, and they can tell you, that somebody had been advising young men to register or not to register, and it was a matter that must be left to their own individual consciences. That was definitely decided at the May 23rd meeting, it was said in our previous meeting of May 18.

Q. Was that merely said in regard to the draft? A. The subject of the draft was not up.

Q. I mean, was that merely said in regard to the draft? A. The subject of the draft was not discussed at any of our preliminary meetings; it had not come up, we had not reached that stage at that time.

Q. Are you quite sure about that? A. The general stand of conscription—personally, I am against it.

Q. Wasn't there a good deal of discussion on the night of the 16th of May?

Mr. Content: The 18th.

Q. No, the 16th. A. You mean the 16th, the little preliminary meeting we had?

Q. Yes. A. The 16th, that was before the 18th meeting.

Q. Before the bill passed? A. Certainly there was discussion about it; there was no advice given to anybody.

Q. You were present on the 18th? A. I was present on the 18th.

Q. Did you hear the speeches? A. Not all of them, as I told you I was——

Q. Was there any advice given by either of the defendants on that occasion on any subject? A. At all our meetings——

Q. Please answer that single question; it is about as simple a question as I can frame. You heard the speeches. A. I did not hear the speeches.

Q. Did you hear Mr. Berkman speak? A. I did not. I heard Miss Goldman.

Q. Did you hear Miss Goldman? A. I was standing on the stage.

Q. Were you in Hunt's Point Palace? A. Yes, sir.

Q. Was advice given there, do you know? A. There was a statement giving their position on conscription and different things; there was no advice telling people to do this or not to do this.

Q. You are quite sure of that? A. I am, I feel I am, sure.

Q. Did you hear the speeches at the Hunt's Point Palace? I mean of the two defendants? A. Yes, I was in position.

Q. Did you hear everything? A. I heard their speeches.

Q. Is it your recollection then, that nothing on that occasion was said in the way of advice or counsel to other persons in regard to their registration, or what you call conscription? A. No; what I call registration or conscription.

Q. I say in regard to either registration or what you call conscription? A. As I remember, at this meeting they were definite—they took a definite stand, they stated emphatically their position on this whole thing: "I am not in a position to say on any of those subjects, do this or do that."

By Miss Goldman.

Q. Miss Fitzgerald, you said you have known me for a number of years? A. I have, Miss Goldman.

Q. You have heard me speak a great many times? A. I have.

Q. Have you at any time heard me say to people, this or this or that must be their stand? A. I never have, Miss Goldman, entirely to the contrary.

Q. Approximately, can you give the Court the outline in a few words, what my emphatic position is?

Mr. Content: On conscription.

A. Your position on conscription, that as an American citizen we think it violates the rights and liberty of the individual.

Q. In other words, it always gives my position? A. Your position.

Q. Not to tell others what to do? A. What to do.

By Mr. Berkman.

Q. There were other people present at the meeting of May 23rd? A. Yes, sir.

Q. Who spoke, too, at the time? A. Yes, sir.

Q. And those people heard the letter read, if it was read? A. Yes; they all heard it.

Q. Was a representative of the Union Against Militarism?

Mr. Content: She already answered this; no reason for his leading any further.

The Court: That is the Emergency Peace League, the Union for Democracy, one representative represented five thousand conscientious objectors from Brooklyn?

The Witness: Yes, sir.

Q. At this meeting, the preliminary meeting called to arrange for the mothers' meeting——

The Court: She has been all over that. Do not ask that question.

Q. I wanted to know whether it was formal or informal? A. Informal.

Q. Could I, for instance, call a meeting if I felt like it? A. Yes, sir.

Q. I could. Did I have to consult anyone? A. No, sir.

Q. Any of the active members of the organization are authorized to call meetings? A. Yes; they would have to notify me, and I would go about it. I can, perhaps it would be better to make that clear; any member of the League could call for a meeting, they simply let me know about it.

Q. Informal affairs? A. Informal affairs.

Q. Were there any minutes taken in the meeting? A. None; except the things that we wanted, like getting out bulletins, or getting up a manifesto, or getting up lectures; those things were jotted down.

Q. They would be instructions to the secretary? A. Yes, sir.

Q. Minutes of the meeting? A. No, sir.

Q. Because they were only informal affairs? A. Because they were only informal affairs.

Q. Was the meeting of May 23rd called for two special purposes? A. It was.

Q. State the purposes? A. To discuss the subject of registration, and the plans for the other meeting, the mothers' no-conscription meeting on June 4.

Q. Did we take any definite stand on registration at that meeting? A. We did.

Q. That was the first meeting at which the League took a definite stand? A. Yes, sir.

Q. What is the stand taken by the League finally? A. The stand taken by the League was not to advise or urge young men not to register; would not tell them to register or not to register, it was left to the individual, and at that meeting there were various opinions expressed, some for registration and some against registration; but the stand of the League, and they decided at that meeting, after the letter of Miss Goldman's was read, was that the League as a league would not advise people to register or not to register.

Q. That is the position taken after the reading of Miss Goldman's letter, and after discussion? A. After reading Miss Goldman's letter and the discussion; there was quite a lengthy discussion; different delegates were there, expressed themselves, and our own people expressed themselves, and the stand of the League after all this was they would not advise people to register or not to register; it was an individual matter.

Q. The papers you kept in your office; did you keep all the papers received or letters received for the last year? A. I did not; no, sir.

Q. You only kept what you considered papers to be of use in the future? A. Yes, sir. Just let me explain that. I have just moved the last files, etc., from San Francisco to New York; there were a great many destroyed, no use for them, just filled up the space; and I decided not to keep everything, to keep in the office, unless I considered it of importance.

Q. Your custom was not to keep these letters if they were useless, so far as you know? A. If I considered it of no importance after the business was attended to, I simply destroyed the letter so as not to fill up the files of the office. I know business houses keep whole rooms full of letters. If we would have something new in the office, simply put it away.

Q. The no-conscription business is constructed not as one big corporation? A. No, sir.

Q. The space is rather limited in our office? A. Yes.

Q. Did you hear me while I was in the office of *The Blast* call up various people, informing them about the meeting of May 23rd? A. You did.

Q. And those people you did not consider it necessary to write? A. Not the ones, I said, we told; those came in the office or called up, some were written to; some, I think, some of the delegates are in the room now; they received letters from me, asking them to come.

Q. Approximately, was there a meeting on May 9 of the No-Conscription League? A. It was our first meeting.

Q. Do you remember what kind of a day it was, Sunday, Monday, Tuesday, etc? A. May 9, Wednesday, I think.

Q. Was May 23rd a Wednesday? A. Yes, sir.

Q. You can find out from the calendar; I do not remember myself, I have no idea about the matter.

Mr. Content: You are not on the witness stand.

Q. The first meeting of the No-Conscription League was on May 9, probably a Wednesday, and the next meeting May 23rd—— A. The next meeting was the 16th.

Q. Was that a Wednesday? A. Well, I could not tell you without looking.

The Court: May 23rd was a Wednesday; subtract seven from the date of Wednesday and you will have it.

Q. May 9 was a Wednesday, May 16 was a Wednesday, and May 23rd was a Wednesday; do you remember at this first meeting we called, that the No-Conscription League would have a meeting every Wednesday? A. I believe that was the thing.

Q. Those people I did not reach by 'phone, and those people who were not at the previous Wednesday meeting, and before the next meeting we would send them a postal card? A. Send them a postal card or a notice.

Q. When you received the letter from Miss Goldman from Springfield, did you read the letter and statement? A. I only read the statement, I did not have the letter.

Q. I mean the little note.

The Court: Are you asking what she did herself?

Mr. Content: Which was read at the meeting.

The Witness: You mean, when I received the original in the office?

Q. Received it in the mail. A. Certainly, I read it.

Q. You read the note, and you read the statement? A. Naturally, it was addressed to me.

Q. And then you typewrote the statement? A. I typewrote the statement; yes, sir.

Q. And then did you hear it read in the meeting? A. I read it myself.

Q. So that you read the statement repeatedly?

Mr. Content: She has not said that at all.

Q. I am asking, did you read the statement repeatedly? A. I read it when I received it, I typewrote it, and it was then read at the meeting.

Q. I would like to say to the jury—have you got a good memory? A. I think I have a pretty good memory.

Cross-examination by Mr. Content.

Q. Now, Miss Fitzgerald, this letter, the personal note, which you destroyed, you did not take that to the meeting of May 23rd? A. I did not, Mr. Content, I explained that.

Q. You did not make a copy of it? A. There was no necessity for that.

Q. You did not make a copy of it? A. I did not.

Q. Do you usually destroy Miss Goldman's letters to you? A. Some I destroy, some I do not destroy; I think I have destroyed all her letters.

Q. You think you have? A. I think I destroyed all the letters.

Q. You say her handwriting is hard to read? A. I destroyed all letters whenever it was necessary,

I destroyed them, because I did not want to be burdened with them.

Q. I see. You looked through the files with one of the officers, the other day, in order to find this letter? A. I did conscientiously; first I said I did casually. So—I spent half an hour down on them with this gentleman; there was another man who unlocked the door; I looked through all the papers.

Q. You did not find anything missing or destroyed by the District Attorney? A. I did not look for anything else; I was looking specifically for that.

Q. There were a great many papers there? A. Yes, there were a great many papers there.

Q. You say Miss Goldman has an illegible handwriting? A. Yes, sir; Miss Goldman has an illegible handwriting; it would be pretty difficult for anyone not used to her handwriting to read it.

Q. You think that you usually destroy her letters after they are received? A. I destroy all letters.

Q. I show you some of Miss Goldman's letters, and ask you whether the inscription reads, "Denver, July 3"? A. That is Miss Goldman's letter —handwriting.

Q. That is her handwriting, "Denver, July 3"; "Dearest Sash." Who is Sash?

Mr. Berkman: May I explain?

Mr. Content: I am asking who Sash is.

A. That is a personal matter. The one who wrote that——

Q. I am cross-examining; who is Sash, do you know?

Mr. Berkman: Please answer.

Q. Do you know who is Sash? A. Well, Sash is Russian for Alexander; Miss Goldman has addressed Mr. Berkman as Sash.

Q. That is a letter addressed to Mr. Berkman. Here is another letter from Chicago, July 16, quite a long letter; is that Miss Goldman's handwriting (handing paper)? A. Yes, sir; that is Miss Goldman's handwriting.

Q. "E" stands for Emma, I suppose; these are all legible, or am I reading them correctly? "Dearest Sash"——

Mr. Berkman: I object to reading personal letters; I think it is very indiscreet and immoral on the part of the District Attorney; he knows better. Now, this letter is not addressed to Miss Fitzgerald, but to Mr. Berkman. What business have you to read it here? I consider it is a damned outrage; I apologize to the Court.

The Court: There is no use getting excited; the District Attorney has a perfect right to call the attention of the witness to certain letters if he found them, and he has a perfect right to ascertain whether the handwriting is legible or not legible. You will let me see the letters (handed to the Court).

Mr. Berkman: It has been said by Miss Fitzgerald that she considers the handwriting of Miss Goldman as illegible. I think reading my personal letters very indiscreet; I do not know what is in the letter.

Mr. Content: I do not know either; I did not read the letter.

Mr. Berkman: You started to read it, and I stopped it.

Mr. Content: I have not read these letters; I have not the slightest idea what is in any of these letters. I simply used them for the purpose of showing her handwriting was not illegible; I merely wanted to show that a near-sighted gentleman like myself

could read them. I do not know what is in any of them; I do not care, what is more.

The Court: I think I have arrived at a solution. I will let the defendants go over these letters, this particular letter that the District Attorney started to ask the contents of; there is nothing at all of any character that is personal in the sense of disclosing private or personal affairs——

Mr. Content: Suppose you just take the first page.

The Court: Let the District Attorney show the defendants these letters, and in each letter you select a half or a quarter of a page, simply for the purpose of showing the character of the handwriting. You may select something that is quite innocuous; for instance, beginning in that letter——

Mr. Berkman: I will object to reading any of these letters, to use the letters as copies. I do not think it fair. Miss Goldman is known to travel around a great deal.

The Court: You are arriving at a conclusion, and bringing up a situation that does not exist. There is no purpose on the part of the Court, at least, to allow in evidence any letter that has to do with mere personal or private matter; I only desire to allow in evidence some few lines, containing no information of a personal character, entirely innocuous in itself, to show the character of the handwriting, that is all. Instead of doing as I have thought to do, to allow the whole letter to go to the jury for that purpose, I have allowed you to select some few lines of an innocuous character, solely for the purpose of the handwriting and nothing else. I haven't allowed all the items and statements that have nothing to do with the case; simply for the purpose of the hand-

writing. Now you may select any four or five lines, containing no intelligent reference to any private matters.

Miss Goldman: I have no objection whatever to anything which is not of a personal nature being read or shown to the jury; I wish to call your Honor's attention to the fact that a letter written in ink, sitting down at a table, would naturally be entirely different than a letter written on a fast running train with a pencil.

The Court: That, Miss Goldman, is a matter of argument; there is no testimony when the letter was written, and there can't be any until the person who wrote it herself testifies here, if she so concludes. In any litigation, whether civil or criminal, the Court would not allow to have introduced some purely personal matter which is utterly immaterial. Two persons may write to each other in regard to a great many things, formal affairs, personal affairs, what not, utterly immaterial. And the sole purpose, I call your attention to, and I trust quite clearly, is simply to select something or other there which is entirely innocuous, and irrelevant, except on the point of disclosing the handwriting, which the District Attorney in view of the remark of Miss Fitzgerald, has as a matter of law a right to do. There is no occasion——

Mr. Berkman: I have no objection to it being read.

Mr. Content: This only goes to her credibility. I want to state I have not read the rest; I have only read the first page; I will confine my question to that.

Q. I ask you to look over my shoulder while I am reading the letter, to see if I am reading it correctly: 'Denver, July 3rd"——

The Court: Let it be marked in evidence.

Mr. Content: I offer it in evidence.

(Marked in evidence as Government's Exhibit No. 57.)

Mr. Content: I would like to have the rest of them marked for identification, merely to show that they are Miss Goldman's letters, for the purpose of comparison.

(Letters marked Government's Exhibits 58 and 59 for Identification.)

Q. These are letters it will take one-half of a storehouse to hold? A. I was not talking of anyone else's letters.

HELEN BOARDMAN resumed the stand.

Cross-examination by Mr. Content.

Q. Miss Boardman, I just want to ask you a few questions. You say you attended the meeting on the 18th of May; you attended the meeting? A. Yes, sir.

Q. At the Harlem River Casino? A. Yes, sir.

Q. Did you also attend the Hunt's Point meeting on June 4? A. Yes, sir.

Q. Well, now you stated—or what did Miss Goldman state in her speech of May 18th, according to your recollection? A. She said that she would not advise persons in regard to registration, because she did not believe in dictating another person's course of action.

Q. What else did she say during that speech? A. Well, her speech was on the subject of conscription, covered it generally.

Q. Do you remember any other phrase which she used outside of this one, to which you have already testified? A. I did not mean that as a quotation from her speech.

Q. I did not mean an exact quotation, I mean just the phrase on a particular phase of her speech; I quite understand you. I do not mean you could give it verbatim, you explained that on your direct examination. I mean, can you remember any other phrase that was made, not verbatim, but in substance? A. She said she was opposed to conscription, opposed to war.

Q. She said she was opposed to conscription and opposed to war? A. Yes, sir.

Q. Anything else? A. It is a little difficult to recall just now.

Q. Did she refer to Russia in any way? A. Yes, sir.

Q. What did she say about Russia? A. She was referring to Russia, the free Russia, and the revolution in Russia.

Q. What is your recollection of what she said about free Russia? A. I believe she said that Russia is in a freer position than America.

Q. Do you remember any of the remarks at the Hunt's Point Palace meeting on June 4th, in the Bronx? A. No; I did not hear the speeches.

Q. You did not hear any speeches? A. I was in the back of the hall; I was surrounded by soldiers; it was not very quiet.

Q. Miss Goldman spoke loudly and clearly that evening? A. Yes, but I was busy; I was taking up a collection.

The Court: Where were you, in the back of the hall?

The Witness: Yes, sir; but the most of the time I was in the box.

Q. Did you hear Mr. Berkman's speech on June 4? A. Well, no.

Q. Where were you during his speech? A. I was also at the back of the hall.

Q. Don't you know no collection was taken up during his speech? A. No collection was taken up during his speech, because I was simply standing at the back of the hall, moving about; there were a great many people standing all around about me; I heard fragments of it.

Q. Do you remember anything Alexander Berkman said on June 4th? A. No, sir.

Q. Do you remember anything Emma Goldman said on June 4? A. All I heard of her speech was at the time when the soldiers tried to create a disturbance in the hall, or quarreling with the crowd.

Q. Don't you confuse the May 18th speech and the June 4th speech with reference to the remarks and the matter of registration? A. No, not at all.

Q. Who spoke besides Miss Goldman on May 18th? A. May 18th.

Q. Yes, at the Harlem River Casino? A. Mr. Abbott, Mr. Weinberger, and Mr. Berkman.

Q. Is that all? A. That is all I remember.

Q. Did Mr. Carlo Tresca speak? A. I do not remember the name; somebody else spoke besides them; I do not remember who it was.

Q. Do you know Mr. Tresca, an Italian? A. No, sir; I do not. During part of that meeting I was standing in the lower part of the hall, I was not able to hear any speeches while I was there; I walked up afterwards into the box and I heard Miss Goldman's speech very distinctly.

Q. How far away were you from the stage while Miss Goldman was speaking? A. I can't tell. I think it was about the fourth box away from the stage.

Q. She could be heard distinctly there? A. I could hear quite distinctly by leaning forward, and concentrating entirely upon it.

Q. Miss Goldman is quite a speaker? A. Very good.

Q. She enunciates clearly and distinctly? A. Yes.

Q. As good as most women orators, or does it even better; would you consider her better than most female speakers? A. Better than most speakers.

By the Court.

Q. You stated that you belonged to some educational association? A. Yes, sir.

Q. Where is its office? A. 70 Fifth Avenue.

Q. Who are the directors of that organization, the managers or what? A. It is run by a committee.

Q. Who are on the committee? A. Mr. Webster Mitchell, Miss Hunt, Harriet Johnson, and Miss Dallas.

Q. Now, were you a member of this No-Conscription League? A. Yes, sir.

Q. Did you attend the meeting of May 16th? A. The meeting of May 16th? No.

Q. Did you attend the meeting of May 23rd? A. Yes, sir.

Q. At Miss Goldman's house? A. Yes, sir.

Q. Have you attended all other public meetings? A. No, not all of them.

Q. Well, in addition to the two meetings that you have referred to, have you attended any other public meetings? A. I went to the meeting at Forward Hall, we were unable to get in.

Q. Do you remember all of them? A. I could probably, the date.

By Mr. Berkman.

Q. Now, the private meeting, private, I mean the meeting other than when the general public were invited, how many of those have you attended? A. Only one.

Q. That is the one of May 23rd? A. Yes, sir.

Q. How long have you known Mr. Berkman? A. I only met Mr. Berkman once.

Q. How long have you known Miss Goldman? A. I have met Miss Goldman twice.

Q. Miss Boardman, do you remember the time when I spoke at the Hunt's Point Palace? A. Yes, sir.

Q. Do you remember whether there was any noise on the part of some persons there? A. Yes.

Q. Throwing things? A. Yes, sir.

Q. Shouting? A. Yes, sir.

Q. You were in the back, in the audience? A. Yes, sir.

Q. Would not be anything unusual if you did not hear us under those circumstances? A. No.

PIETRO ALLEGRA, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. Where do you live? A. 65 Webster Avenue, Long Island City.

Q. Where are you working? A. At the Novelty Company, Long Island, at some factory in Long Island City.

Q. How long were you working at that place? A. Eleven years.

Q. Have you been at the Harlem River Casino? A. Yes, sir.

Q. The meeting on the 18th of May? A. Yes, sir.

Q. Where were you in the hall? A. On the platform.

Q. Did you see me on the platform before speaking? A. Absolutely no.

Q. You heard me speak? A. Yes, sir.

Q. Can you approximately remember the gist? A. The which?

Q. Can you remember the gist? Can you remember my saying I believed in violence, and we will use violence? A. Never you say this.

Q. Can you remember parts of the address, the speech made by me that evening? A. Yes. You talk against war, and about conscription, I was an anarchist and I would not tell what to do. It is unnatural, an anarchist would not tell people what to do.

Q. As an anarchist, I did not order people what to do? A. Sure.

Q. Excepting to ask them to assist. You say you were on the platform of the Harlem River Casino? A. Yes, sir.

Q. I mean, did you see a soldier walk up to Mr. Berkman? A. Never.

Q. Mr. Berkman then had this sore foot, did he not? A. Yes, sir.

Q. Were there friends near him? A. Yes, sir.

Q. So as to protect his foot? A. Sure.

Q. You have known me for awhile, have you? A. For a long time.

Q. Have you attended many of my lectures? A. Many meetings; before the war, too.

Q. Did you hear me at any time say we believe in violence and we will use violence? A. Never.

Q. Did you read some of the things—— A. I did.

Q. Some of my works, for instance? A. Yes.

Q. Did you hear me say at the meeting in the Harlem River Casino, anything in relation to conscription and registration? A. I heard before, you say, as an anarchist, you cannot tell what you got to do, do what you please.

The Court: What is that? As an anarchist, you heard her say, you cannot tell, you do what you please?

The Witness: Exactly.

The Court: Did you hear anything about conscription, that is what Miss Goldman asked you.

The Witness: About conscription? The conscription is against the law, against the Constitution of the United States.

The Court: You heard Miss Goldman say it is against the Constitution of the United States?

Miss Goldman: I think perhaps he did not understand.

Q. I did not mean to ask you what you thought about conscription or about registration; I asked you approximately what you heard me say at the meeting.

The Court: What did you hear Miss Goldman say?

The Witness: I do not remember; that is my idea——

The Court: You do not remember what you said?

The Witness: No, sir.

The Court: When you spoke about the Constitution of the United States, you were talking about your own view?

The Witness: Yes, sir.

By Mr. Berkman.

Q. Mr. Allegra, you stated you were on the platform at the mass meeting of May 18th? A. Yes, sir; May 18th I was—that is the first mass meeting.

The Court: At the Harlem River Casino.

Q. On the platform? A. Yes, sir.

Q. You had business there? A. I must speak at that time.

Q. You were to be one of the speakers? A. Yes, sir.

Q. Did you speak there? A. No, I did not speak, because the soldiers and the sailors started some disturbance to provoke the people.

Q. That meeting was one—do you remember all the speakers who spoke? A. Yes, sir.

Q. Mr. Tresca, who was mentioned here, was he a speaker? A. No, he is not a speaker.

Q. Did he speak at the meeting? A. Who, Tresca?

Q. Yes. A. No.

Q. Was he there? A. No, sir.

Q. At that meeting you were on the platform, do you remember where I was sitting on the platform, or standing, before I spoke? A. No, sir; you sat just the same position you sit now.

Q. Were there many people around me? A. Yes, sir.

Cross-examination by Mr. Content.

Q. Now, Mr. Allegra, how old are you? A. How old?

Q. Yes. A. I am ashamed to tell, forty-one.

Q. Where were you born? A. In Italy.

Q. When did you come to the United States? A. Why?

Q. When? A. About ten or eleven years ago.

Q. You are an American citizen? A. I have a paper, too.

Q. What is that? A. I have a paper.

Q. You completed your naturalization?

The Court: He wants to know whether you are an American citizen.

The Witness: Yes, sir.

Q. Were you admitted to citizenship? A. Yes, sir.

Q. And got your final papers? A. Yes, sir. The last papers.

Q. When? A. About four years ago, I guess

Q. Where? A. In Long Island.

Q. What court? A. Jamaica.

Q. Jamaica Supreme Court?

Mr. Berkman: I object to it; what has that got to do with the case?

The Court: Overruled.

Q. The Supreme Court? A. I do not remember.

Q. Do you remember the Judge's name? A. No, sir.

Q. Are you an anarchist? A. Well, if you answer, you tell something about it. Before, I was a Socialist; before this war; I am so disgusted about this war, it is enough to make a man an anarchist.

The Court: "I am so disgusted"—you mean you are an anarchist now? Are you now an anarchist?

The Witness: I say, I feel I am to be an anarchist; I am so disgusted with this war; I find out everybody is a liar; I find it is a terrible struggle against the working people, because they are being antagonized in business——

Q. You have even addressed meetings, street meetings and otherwise? A. All over, addressing meetings.

Q. You usually speak in Italian? A. Yes, sir, all over the United States.

HARRY M. KELLY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. You write for mazagines and papers? A. Yes, sir.

Q. You have known me for a long time? A. A very long time.

Q. How many year, approximately, have you known me? A. Personally, over eleven years.

Q. Personally ten years? A. But through correspondence years before that.

Q. Are you a native? A. Yes, sir.

Q. Where were you born? A. In Missouri.

Q. We have been friends a great many years? A. Yes, sir.

Q. Do you know that my San Francisco office, in New York, was on the second floor of 20 East 125th Street? A. Yes, sir.

Q. Was it a front room or a back room? A. A back room.

Q. What is the front room? A. The front room is occupied by the man——

Q. I am speaking of the second floor— A. The second floor, the second floor is occupied by *Mother Earth*.

Q. While I was working in this City on the California matters, where was my office? A. Your office was on the second floor.

Q. Where on the second floor, back or front? A. Back.

Q. And *Mother Earth* was in the front at the same floor? A. Yes, sir.

Q. Do you know whether I published a paper in California? A. Yes, sir.

Q. What was the name of the paper? A. *The Blast*.

Q. Do you know whether editions of *The Blast* have appeared in New York? A. Yes, sir.

Q. Approximately how many? A. Two, I think; one I know.

Q. You are a writer for *The Blast?* A. I am a writer, and occasionally contribute.

Q. When I decided to bring *The Blast* to New York, do you know whether I was looking for an office for it? A. Yes, sir.

Q. Were you occupying any place at 20 East 125th Street? A. Yes, sir, the third floor back.

Q. You had the third floor back? A. Yes, sir.

Q. Do you remember a conversation in which I asked you whether you are going to use your room during the summer? A. Yes, sir.

Q. And what did you tell me? A. I told you no.

Q. You said you were not going to use the room. Did I say on that occasion I would like to use your room for *The Blast?* A. Yes, sir.

Q. What arrangements did we make about the room? A. Why, simply I was not there—I was not sure whether I would keep the room permanently. I thought I would, but I knew I would not occupy it for that summer, and I told you you could have it.

Q. So far as you know, I have been using that room? A. I have been up there since, and you have.

The Court: What magazines do you write for, Mr. Kelly?

The Witness: Why, I have contributed considerably to *Mother Earth*, *The Blast*, and a magazine I am interested myself in, *Modern Psychology*.

Mr. Content: No questions. That is all.

ANNA SLOAN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. What is your profession? A. Housekeeper.

Q. Have you any connection with art? A. I am married to an artist.

Q. The famous American painter, John Sloan? A. Thank you, Miss Goldman.

Q. Have you known me for some time, Mrs. Sloan? A. Ten years.

Q. In what way have you known me? A. I have known you intimately, both socially and in doing our work, birth control, strikes, taking care of strikers' children, what we think is wrong with the world, and what we have to do to correct the evil of the world.

Q. During your different associations with me in work and socially, have we occasionally discussed different theories? A. We have, Miss Goldman.

Q. Have we discussed anything pertaining to questions of violence? A. Yes, Miss Goldman.

Q. And can you approximately recollect in what connection? A. I remember one day that we talked, I distinctly asked you if you believed in violence, and you said "Ann, I do not believe in violence; I do not believe in anything that would not be explained."

Q. Were you at the Harlem River Casino meeting on May 18? A. I was.

Q. Could you hear the speeches? A. I could hear the speeches, yes, ma'am.

Q. You heard me speak? A. I did, Miss Goldman.

Q. Can you recollect whether at any time during that address that evening, I said we believed in violence and we will use violence? A. I did not hear you say anything of that kind, Miss Goldman.

Q. If you would have heard me, I mean, would it have been anything that you remembered? A. I would have remembered it, because I would have been shocked, after our conversation regarding that.

Q. Mrs. Sloan, you stated we were drawn together a great deal in work, birth control, and other matters; have you any recollection whether we were in the habit of exchanging lists of different people? A. We always exchanged lists.

Q. Liberal people interested in different ideas? A. Yes, ma'am.

Q. And in all the time you have known me, can you recollect any incident in the work in which we were drawn together, whether it was my habit to send out letters indiscriminately to people, regardless of whether they would be interested or not? A. I know you did nothing of that kind, Miss Goldman; I suggested names—we suggested names to each other, who would suggest other people who might be interested in our work. Then I gave you names for the Russian lecture course, whom I tried to reach for you.

Q. Do you remember the name of a lady and gentleman, Demorest? A. Mrs. Demorest is one of the names I suggested among the persons who would be interested in the Russian lecture course, in the so-called radical movement.

Q. And then you gave me the names? A. I gave you the names, suggesting those names be used.

Q. Mrs. Sloan, you have received letters from me occasionally, have you? A. I have, yes, Miss Goldman.

Q. In handwriting? A. I received handwritten letters from you, and I wrote you and asked you please not to write me handwritten letters, because I had to get Mr. Sloan to translate them, he did not like it any more.

Q. You found it difficult to decipher my writing? A. I did, Miss Goldman.

By Mr. Berkman.

Q. At the Harlem River Casino meeting, did you hear Miss Goldman or Mr. Berkman tell the people to register or not to register, advise or urge them not to register? A. No.

Q. Did you hear any other speakers advise people to register or not to register? A. No, sir.

Q. We had conversations on various matters connected with the movement we are interested in? A. Yes, sir.

Q. Did you hear me express any opinion with regard to advising people not to register? A. I asked you one day what you were going to do, and you said it was something that everybody in his own conscience should determine.

Q. Mrs. Sloan, when did you meet me personally? A. During the strike, I think it was 1911.

Q. The strike in 1911? A. Yes, sir.

Q. You met me again when I returned from the Coast? A. Last October.

Q. Do you know why I came then; for what purpose I came to New York? A. I knew after Miss Goldman told me you were here representing Thomas Mooney and his co-defendants, sent by organized labor in San Francisco, to help get publicity and money to save the lives of the men and women condemned to death out there.

Q. Did you see my credentials of my California unions? A. I did not.

Q. Did you hear me speak at the various labor unions in the City of New York? A. Yes, sir.

Q. On behalf of the California labor? A. I did.

Q. You heard me make my addresses? A. Yes, sir.

Q. Did you know I devoted all the time I was in New York to the California labor? A. I know you did.

Q. Do you recollect seeing my California office in this city? A. I know you had a temporary office in 20 East 125th Street.

Q. Was it front or back? A. In the back room

Q. Ever since *The Blast* was being published in New York, where did you know my office to be? A. At 20 East 125th Street.

Q. I mean, outside of the office in the back of the second floor? A. Upstairs, you got an office upstairs.

Q. On the third floor, is that? A. On the third floor.

Q. You know I used also an office on the third floor? A. Yes, sir.

Q. Mrs. Sloan, you heard me ask the labor organizations in this city for money for the California labor fund? A. I did, Mr. Berkman, yes, sir.

Q. You heard me say I am here in behalf of the innocent labor men on trial? A. Yes, sir.

By the Court.

Q. As I understand it, you are the secretary and treasurer of this Mooney defense trial? A. Here in New York.

Q. A considerable amount of money was collected? A. Quite a lot; Mr. Berkman representing the San Francisco labor fund, I turned it over to him, and he forwarded it to San Francisco; they knew him there, they did not know me.

Q. If there is a check for $1000, it is there? A. Yes, sir.

Mr. Content: It is May 9th, and it is not in evidence.

The Court: Very good.

Mr. Content: It was excluded on the defendants' objection.

The Court: I understand. The defendants called attention to it. He said she was the secretary and treasurer of this Mooney defense fund, or whatever the proper name of it is, and various sums of money were col-

lected, among them the thousand dollars which the defendant Berkman forwarded to California, for matters in connection with the fund.

Cross-examination by Mr. Content.

Q. I did not hear the name of the association of which you were treasurer; what is the name of it again? A. I was secretary and treasurer of the New York Publicity Committee for the San Francisco International Workers' Defense League.

Q. What was the purpose of collecting the funds? A. What was the purpose of collecting the funds? To pay lawyers with, Mr. Content.

Q. For what? A. To defend Thomas Mooney and his co-defendants, who we think are unjustly accused there of throwing a bomb in the Preparedness Parade in San Francisco.

Q. They are charged with murder in the first degree? A. Yes, sir, they are. And the District Attorney is charged with subornation of perjury.

By Mr. Berkman.

Q. As a matter of fact, you were instrumental in engaging Mr. Bourke Cockran of New York to go to San Francisco and defend the defendants? A. I was.

By the Court.

Q. Are you a member of this No-Conscription League? A. No, sir, I am not a member.

REBECCA SHELLEY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Miss Shelly, what is your occupation? A. I was a school teacher until 1914; since 1914 I have been working on peace propaganda.

Q. You belong to the Emergency Peace Federation? A. I am field secretary for the Emergency Peace Federation.

Q. Field secretary? A. Yes, sir.

Q. You are a graduate of some university? A. I am a graduate of the University of Michigan.

Q. You are a native? A. Yes, sir, very much a native.

Q. Your parents also? A. Yes, sir.

Q. You are interested in educational matters? A. Yes, very decidedly.

Q. You have been active in various movements that deal with general eduaction? A. Yes, sir, as a public school teacher I have been rather active.

Q. Do you remember a meeting on May 23rd? A. Yes, sir, I remember the meeting.

Q. A meeting that was had at Miss Goldman's apartment? A. Yes, sir.

Q. Were you there? A. I was.

Q. Was the Emergency Peace Federation invited to be present at the meeting? A. The Emergency Peace Federation received a letter from—in fact, I believe from Miss Fitzgerald, requesting the organization to send a delegate to a meeting of the No-Conscription League; I came unofficially representing the Emergency Peace Federation; we had no time to elect a delegate officially, and as there was no meeting of the executive committee I simply came in my own capacity.

Q. Do you know of your knowledge whether the Emergency Peace Federation received a letter from

the No-Conscription League, signed by Miss Fitzgerald, inviting you to that meeting on May 23rd? A. Well, I am not absolutely sure that Miss Fitzgerald signed the letter; I think, however, she did. I remember Miss Fitzgerald was one of the names on the letterhead of which I have any recollection.

Q. Was the letter on the official letterhead of the No-Conscription League? A. It was.

Q. Will you state the character of the meeting? A. I do not remember the exact wording of the letter, but as I recall it, the meeting was called for the purpose of discussing the attitude of the No-Conscription League on registration, and the organization of a mass meeting.

Q. Was Miss Goldman present at the meeting? A. She was not.

Q. Was Mr. Berkman present? A. Yes, Mr. Berkman was present.

Q. At that meeting on May 23rd, you say, Miss Goldman was not present? A. No, sir, she was not.

Q. Was anything said or mentioned why Miss Goldman was not present at that meeting? A. Yes, Miss Goldman was not present because of a previous engagement to speak elsewhere.

Q. Was any word received from Miss Goldman? A. Yes, a letter was, as I have since heard, designated a statement, read from Miss Goldman.

Q. A statement was read from Miss Goldman? A. Yes, sir.

Q. Tell us as near as you can remember the contents of that statement? A. The statement expressed Miss Goldman's regret that she was unable to be present at this meeting; she said a speaking engagement of previous standing compelled her to be absent. In this letter she expressed her desire that the members of the No-Conscription League and others who had looked to her for leadership and advice, stand true to the conviction, to their convictions, and be loyal to their consciences, be loyal

to right as they understood it, with regard to the immediate pressing questions, that of registration. Miss Goldman stated in this letter that she, as an anarchist, did not propose to advise or urge anyone, either to register or not to register. I am not familiar with the science of anarchism, but I understood——

Mr. Content: I object, we do not want what the witness understood.

The Court: You are confined to giving your recollection of what was in the letter.

A. I surmised—the letter then apparently was in accordance with certain principles of the writer, she stated that she could not advise either to register or not to register, that would be taking the same sort of attitude that the writer objected to in the Government, when the Government attempted to use compulsion where matters of conscience are concerned. That embraces my recollection. I am not giving the exact wording.

Q. You are absolutely certain such a letter or such a statement from Miss Goldman was read? A. Yes, I am certain.

Q. What did the meeting do after the statement was read? A. The meeting then entered into a discussion of the questions of registration; I was unable to stay to the end of the meeting; I left between half past ten and eleven o'clock.

The Court: Who read the statement, do you remember?

The Witness: I do not recollect exactly who read the statement.

Q. Are you an anarchist? A. No, sir.

Cross-examination by Mr. Content.

Q. How do you know the statement was from Miss Goldman; that the statement was from Miss

Goldman? A. I do not know the statement was from Miss Goldman, except I took the word of those who presented the statement and read the statement.

Q. You do not know whence it originated, yourself? A. Of course not; I only took the word of those who read the statement.

Q. What kind of a statement was it, I mean typewritten or written? A. I do not know; I saw only the back of the pages or page, but I could not at that time have told whether typewritten or written.

Q. You do not remember who read it? A. I can recollect Miss Fitzgerald began to read it and somebody else finished, although I am not positive of it.

Q. Do you know who else was at the meeting, anyone else? A. Miss Boardman.

Q. Did you know her before, before the date of that meeting? A. I had seen her, I did not know her personally; I have since become personally acquainted with her.

Q. Up to that time you were not personally acquainted with her? A. No, sir.

Q. Who else was there beside Miss Boardman, Miss Fitzgerald and Mr. Berkman? A. Mr. Weinberger arrived there.

Q. You mean Mr. Harry Weinberger? A. Yes, sir.

Q. A lawyer? A. Yes, sir. Professor Dana was also there.

Q. Of Columbia, you mean? A. Yes, sir.

Q. Anybody else that you recall? A. No. I did not know many people in the crowd.

By Mr. Berkman.

Q. You saw Mr. Harry Weinberger at that meeting of May 23? A. Yes, sir.

Q. Do you remember members present asking Mr. Weinberger for his legal advice? A. Yes, sir.

Q. And you heard Mr. Weinberger speak there and give legal advice? A. Mr. Weinberger gave

various legal aspects on the question of registration; I do not think Mr. Weinberger would call it advice, he was giving a legal opinion on the various aspects.

Q. He gave a legal opinion on the various aspects, you say, on this question of militarism and war and everything?

Mr. Content: She said registration.

The Court: What subject did he talk about, did he refer to, Mr. Weinberger?

The Witness: He referred particularly to the question of registration and its relation to conscription, its relation—its possible relation to enforced industrial service; its possible relation to enforced industrial service.

By Mr. Content.

Q. Tell us all what he said, tell all you remember Weinberger said? A. I believe I have told everything I remember about what Mr. Weinberger said.

The Court: You haven't told us anything; you think you have; you said—you simply characterized what he did; what did he say about the legal aspects?

The Witness: The question—the particular question that seemed to be agitating the young men present at the meeting was this, if we register, do we through registration come under military law. Mr. Weinberger expressed both sides of that. And then explained the possible results of registration as far as coming under military law was concerned. He said, according to one opinion, one may come under military law, and according to other opinions one would not come under military law. The conscientious objector to war might be tried under military law, but that, I believe—as far as the law, that was problematical, not certain.

By Mr. Content.

Q. Did he state the legal effect of not registering? A. Yes, sir.

Q. What did he say about that? A. As near as I can recollect, Mr. Weinberger said that if one refused to register, he was imprisoned—he would be imprisoned from one day to one year, if he refused to register.

The Court: You say there was some young men present?

The Witness: Yes, sir.

The Court: What do you mean by young men; you mean young men in the twenties?

The Witness: Young men in the twenties?

The Court: How many of them?

The Witness: I should say there were from twenty to twenty-five, men between twenty-one and thirty-one present.

The Court: In the so-called draft age?

The Witness: Yes, sir.

The Court: Some of them asked for advice, did they?

The Witness: Yes, sir.

The Court: Weinberger gave this yes or no opinion, did he?

The Witness: Yes, sir. He gave the legal aspect of that, which was in the nature of a legal opinion; the legal opinion not being clear in the sense it had not been determined whether or not young men would come under military law if they registered.

The Court: Let us get that clear; you may not be familiar with the exact technicality. You say military law, were you referring to law—was he referring to law administered by the military authorities, or the law relating to the so-called draft act as administered by the civil authorities? I mean, what do you mean by military law—I don't mean

what you mean, what did he say about that; did he point out any distinction between military and civil law?

The Witness: Yes. As near as I understood—I understood Mr. Weinberger, one of the questions at issue upon which he spoke was this: if a young man—if a man registered, then there was the possibility of calling upon the others who were not taken for military service or industrial service; and the question which a number of men asked was this question, can we then, subject to military law, be drafted for industrial service, whether or not we are not taken for military service, could they be drafted for industrial service, must we go under the military law, or do we retain our civil right, the right to refuse to work where we do not want to work.

The Court: That was what you understood him to say as I understand it; you just stated what you understood him to say?

The Witness: Yes, sir.

The Court: Was there any question asked by anybody at that meeting as to the legal effect of advising persons not to register?

The Witness: I have no distinct recollection of anything being said at that meeting.

The Court: Well, is it correct to say there was no discussion upon that subject at all?

The Witness: No, I think that would not be correct.

The Court: What discussion was there at this meeting so far as your memory serves you?

The Witness: As far as my memory serves me there was an appreciation of the fact that advice——

The Court: No appreciation?

The Witness: Appreciation expressed that advice not to register would land the person so advising in jail.

The Court: Who said that?

The Witness: I do not remember who said it. I carefully said, there seemed to be an appreciation expressed of that fact.

The Court: Who said that?

The Witness: I do not remember.

The Court: Was there any discussion in addition to what you have told us about actual service under the draft act; was there anything more on that subject?

The Witness: Well, actual service under the draft act would mean conscription; there was discussion—some discussion on conscription.

The Court: What happened about that?

The Witness: Well, of course——

The Court: Let me correct that. No one can expect you to remember every word said about that; you are only asked for your best recollection.

The Witness: A number of men there expressed their opinion that conscription was contrary to their convictions.

The Court: Was there anything said then by anybody after such an expression of opinion?

The Witness: A number of men said they were going to stand by their conviction.

The Court: That is to say they were going to refuse to do what?

The Witness: Well, I suppose it might be interpreted they would refuse to be conscripted; the chief import of the entire meeting was the discussion of registration, and that was my chief impression, the chief impression carried away from the meeting; I scarcely think it is fair to expect me to remember what was said about conscription.

The Court: I have already indicated you can only be expected to give your best recollection. Now, do you remember whether anyone there said, whether it was Mr. Weinberger or anyone else, in substance or in effect, that registrations under this act were a necessary proceeding or step toward what you call conscription; whether that was pointed out by anybody?

The Witness: I do not quite understand just what you mean by "necessary proceeding."

The Court: Whether anybody pointed out, before, under the act, the Government would call upon those of the age in question to serve in some capacity, that the act required that the person should be registered so that the Government could have the list of those persons within the so-called draft age?

The Witness: I think—yes, I believe they recognized the fact the Government would want their names, a list of the names of the young men.

The Court: You think it was clearly stated at the meeting?

The Witness: I would not say it was clearly stated: I think they understood, simply understood, and that was the understanding though it was not necessarily clearly stated.

The Court: You think it was clear to each of them at that meeting?

The Witness: I think it was clear that the Government felt it necessary to first obtain these names and addresses of men of military age before proceeding to enforce the draft act.

By Mr. Content.

Q. Did any one young man present say he would not register himself? A. There were various views expressed; I certainly do not remember any one young man who so stated.

Q. I do not mean the name; did any one state he would not register? A. Yes, I believe there may have been a number of people there.

Q. I am not asking you his name or to incriminate anyone; I want to know whether that view was expressed? A. I think that view was expressed.

Redirect examination by Miss Goldman.

Q. May I ask whether you have any knowledge of Mr. Weinberger being the counsel-in-chief of the American Legal Defense Society? A. Yes, Mr. Weinberger is counsel for the American Legal Defense Society.

Q. Having been connected with the Emergency Peace Society, do you know, or do you not, that Mr. Harry Weinberger acted merely in his legal capacity when he was called upon? A. Yes. I should say that he acted in a legal capacity in the sense of expressing a legal opinion when called upon.

Q. Then, as I was not at the meeting on the 23rd, I could not ask you as to his interpretation, but so far as you know in connection with the Peace Society, is it or is it not true, that Mr. Harry Weinberger acted as the lawyer for the American Legal Defense Society? A. Yes, that is true.

Q. Then may I ask whether Mr. Harry Weinberger gave legal aspects of the draft and conscription on the night you were there? A. He did.

By Mr. Berkman.

Q. Do you remember Mr. Harry Weinberger stating that refusal to register is punishable by one year and fine, I believe?

Mr. Content: By not more than one year nor less than one day. One day to one year.

The Witness: One day to one year.

Q. Do you remember that somebody expressed the opinion that they would not register, and do you remember whether any reason was expressed by the young men that they would register? A. Yes, there were a number of young men there who repeatedly said they expected to register, and to register as conscientious objectors to the war.

Q. And didn't we discuss at that meeting the question of conscientious objection in connection with the Draft Law? A. Yes, I believe there was such discussion of that.

Q. And do you remember it being mentioned that the term is new in this country, and that we want to present it to the people, "Conscientious Objector"? A. Yes.

By Mr. Content.

Q. In other words, some said they would register, and some said they would not; there was a divergence of opinion, is that correct? A. Yes.

(Recess until 2.05 P. M.)

AFTERNOON SESSION.

(2.05 o'clock P. M.)

MINNA LEDERMAN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Miss Lederman, what is your occupation? A. I have none now. I have just graduated from college.

Q. What college? A. Barnard.

Q. Are you a native of this country? A. Yes.

Q. Did you attend a meeting in the Harlem River Casino on May 18? A. Yes.

Q. Were you near enough to the platform to hear Miss Goldman's speech? A. I was about the eighth or tenth box from the platform, during Miss Goldman's speech.

Q. Did you ever hear Miss Goldman speak before? A. No, I had never seen Miss Goldman before.

Q. You had never seen Miss Goldman before? A. No.

Q. You heard Miss Goldman speak at that meeting? A. Yes.

Q. Did you see her on the platform before she spoke? A. No, I did not. I was watching for Miss Goldman to come, because I had never seen her; and I kept asking people if that and this person were she, and they said, no, and just as she came forward to speak, someone identified her for me.

Q. You heard the whole speech of Miss Goldman? A. Yes.

Q. Very clearly? A. Yes.

Q. Did Miss Goldman during her speech say or read a sentence like this: "We believe in violence and we will use violence"? A. No, sir.

Q. You are positive? A. Positive.

Q. Did she say, or did you hear her say anything which might be construed in that sense? A. No.

Q. Did you hear Miss Goldman at that meeting advise or urge people not to register? A. No, I did not.

Q. Did you hear Mr. Berkman's speech? A. I could not hear his speech at all, because of the noise behind my box becoming louder during Mr. Berkman's speech than during Miss Goldman's.

Q. There was a noise behind the box? A. Yes.

Q. During my speech? A. Yes.

Cross-examination by Mr. Content.

Q. You are a member of the Collegiate Anti-Militaristic League? A. I am.

Q. Is that the same league to which Mr. Phillips and Mr. Cattell belong? A. No, but I was a member of that league. Mr. Cattell was not a member, and I don't know whether Mr. Phillips was.

Q. You are a graduate of Barnard College? A. Yes.

Q. You heard Miss Goldman's speech rather distinctly that evening? A. Yes.

Q. She is a good speaker, is she, in your opinion? A. Very, very.

Q. A very clear speaker? A. Yes.

Q. Where was your box situated with reference to the point where Miss Goldman was standing during her address? A. Well, my box was either the eighth or the tenth on the left-hand side of Miss Goldman.

Q. And you could hear her pretty well from there? A. Yes.

Q. And at the time Mr. Berkman spoke the noise was such that you could not hear, is that correct? A. I could hear him, part of his speech, but not very well.

Q. Who spoke first? A. Miss Goldman spoke first. The noise became increasingly louder as the meeting progressed.

Q. And you are quite positive Miss Goldman said, "We believe in violence and we will use violence"?

The Court: That she did not.

Mr. Berkman: That she did not.

A. Quite positive that she did not say so.

Q. Now, do you remember anything you did hear? A. I remember particularly she approached the audience not to let itself become disturbed by the soldiers who were trying to create a racket.

Q. In what part of her speech did she make that remark? A. Several times.

Q. Do you remember anything else she said during this speech? A. I remember she discussed this conscription, said that the matter of conscription had come so easily in this country and taken a long time to come in England, and not at all in Canada.

Q. Anything else? A. I don't remember anything else.

Q. Did you hear her mention the word registration? A. I don't remember anything about registration.

Q. You didn't—you don't remember that at all? A. No.

The Court: Or the word "register."

Q. Or "register"? A. No.

The Court: Do you say you don't, or that you don't remember.

The Witness: I don't remember that.

The Court: You don't remember one way or the other, is that it?

The Witness: That is it.

Q. Wouldn't you be apt to remember if she made some remarks about registration? A. I was not so much interested in her remarks on registration. I was much more interested in her remarks on conscription.

Q. You don't remember that she mentioned the word "register" or "registration," in any part of her speech? A. I do not say she did not, but I don't remember.

Q. You don't remember her using the word "violence" at any time? A. No, sir. I am sure she did not use the word "violence."

Q. Did she say anything about the Russian revolution? A. She spoke about Russia.

Q. What did she say about Russia? A. She said that Russia had gained a freedom that might prove greater than any freedom that we have in this country.

Q. Is that all she said? A. Well, that is the gist of her remarks on the subject.

Q. Did she mention any celebrated Russian? A. What is the question?

Q. Did she mention any celebrated Russian, that you remember? A. She mentioned Breshkowzka.

Q. Did she mention any American statesmen in her speech? A. I don't remember. It don't seem to me that she did.

Q. It don't seem to you that she did? A. No.

Q. Do you remember whether she mentioned Senator La Follette in her speech? A. I don't remember any mention of Senator La Follette.

Q. Do you know whether she mentioned Senator Stone in her speech? A. No, sir, I do not.

Q. Do you know whether she made any references to Germany in her speech? A. I don't remember any.

Q. Do you recollect? A. No.

Q. Do you remember whether she said this, "They have a Kaiser, the kind of a Kaiser they want and are going to stand for"? A. I don't remember any such statement. I mean if there had been such a statement it would have made an impression on me.

Q. Did you hear her mention the name of Wendell Phillips, in her speech? A. She did mention Phillips, I think.

Q. Did she mention any other writers? A. I am not sure, but I think she mentioned Emerson.

Q. Did she say or do you recall whether she said this: "How many people are going to refuse to conscript, and I say there are enough"? Was anything like that said to your recollection? A. No.

Q. Did she say anything about a subsequent demonstration that was being planned? A. She spoke of other mass meetings she hoped to have held throughout the city.

Q. Have you been at any other meeting that she spoke at? A. No, that was the only time I ever saw or heard Miss Goldman.

Q. You heard her distinctly, as you said before? A. Yes.

By the Court.

Q. Is this the first day you have been in court during this trial? A. Yes.

Q. You say you heard Miss Goldman talk distinctly? A. Yes.

Q. And her enunciation was clear? A. Yes.

Q. Did you have any difficulty at the time in telling what she said? A. No, she kept the audience very quiet.

Q. And during her speech the audience was quiet? A. Well, whenever the noises—there were quite a few noises around the boxes—appeared to get louder, Miss Goldman would silence it; and she refused to have the crowd applaud, several parts in her speech, because it made so much interruption, and so much noise, that she could not get through her speech in time.

Q. Did she speak slowly, or quickly, or partly sometimes slow and sometimes quick, or how? A. I think she spoke rather rapidly.

Q. Did she speak slowly at times? A. I don't remember. I remember only the intentions I came with to the place.

Q. You don't remember how she spoke? A. Well, I don't remember if she spoke slowly at times. I was under the general impression that she spoke rapidly.

Q. And throughout, you had no difficulty in understanding her? A. Not at all.

Q. In the main, were her words simple words? A. Yes, very simple.

By Mr. Content.

Q. It was a mass meeting, and people of all kinds were there? A. Yes.

By Mr. Berkman.

Q. Miss Lederman, if this woman had used the expression, "We believe in violence and will use it," would that have attracted your attention? A. Yes.

Q. And you don't remember having heard such an expression? A. I do not.

Q. Or anything similar? A. Or anything similar.

Q. When the word, Breshkowzka was mentioned by Miss Goldman, she also mentioned another name with it, a Russian name? A. Yes, she mentioned another name there, a Russian name, which I can't remember.

ALFRED SEELENFREUND, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. What is your business or profession? A. Attorney at law.

Q. And are you a native of this country? A. I am.

Q. Were you on May 18th at the Harlem River Casino? A. I was.

Q. Where were you sitting? A. I was sitting in one of the boxes on the left side right above the platform.

Q. And were you on the right or the left side of the platform? A. I was on the left side, that is, with the speaker facing me I was on the left side.

Q. Do you remember Miss Goldman's speaking at that meeting? A. I do.

Q. Did you ever hear her speak before? A. I never did.

Q. Had you ever been to a similar meeting before? A. No.

Q. You were interested to hear Miss Goldman speak, is that it? A. No, no, I had an appointment

with Mr. Weinberger, who is a personal friend of mine, and he told me that he would speak there that night, and I went up there to meet him.

Q. You came to hear Mr. Weinberger? A. Yes.

Q. And did you hear Mr. Weinberger? A. Yes, I heard all of the speakers.

Q. Was there any other purpose in your coming there? A. Why, I told Mr. Weinberger I was going up there to see how violent his anarchists could be.

Q. To see how violent his anarchists could be? A. Yes.

Q. Did you hear Miss Goldman's speech? A. I did.

Q. Did she, during her speech say, "We believe in violence and we will use it"? A. No.

Q. If she had made a statement like that, it would have attracted your attention? A. It would, yes.

Q. Did she say anything that might be interpreted as meaning that? A. No.

Q. You were not in sympathy with the speaker? A. No, I am not an anarchist.

Q. You are not in sympathy with anarchists? A. No.

Q. Did you hear Miss Goldman advise or urge her audience not to register? A. No.

Q. Did you hear Mr. Berkman there? A. I did.

Q. First, to finish with Miss Goldman's speech —is Miss Goldman a rapid speaker? A. Well, she was rapid that night. That is the first time I ever heard her.

Q. That is the first time you heard her and she was rapid that night? A. Yes, rather rapid.

Q. She was clear at the same time? A. Very clear.

Q. She was both rapid and clear? A. Rapid and clear.

Q. Did you hear Mr. Berkman speak? A. I did.

Q. Did you hear everything Mr. Berkman said? A. I did.

Q. Did you hear Mr. Berkman advise or urge people not to register? A. No.

Q. Did you hear anyone at that meeting on the platform advise or urge people not to register? A. No.

Cross-examination by Mr. Content.

Q. Was anything said about registration? A. Why, I don't think there was, Mr. Content.

Q. Now, Mr. Seelenfreund, you are a member of the bar, you know whether that is of importance? A. Well, I paid particular attention to see how far she would go in abusing the law, and I can say I am quite sure nothing regarding registration was said there.

Q. You don't recollect the use of the word "register" or "registration"? A. No, I do not.

Q. And you were there during the entire meeting? A. Yes.

Q. Well, did the people at that meeting take any vote on registration? A. No.

Q. Or did they make any pledges or anything of that sort? A. No.

Q. There was no *viva voce* vote, or anything like that? A. No.

Q. And your best recollection is that words "registration" or "register" were not mentioned at all? A. That is my best recollection.

Q. Do you remember anything else that was said during Miss Goldman's speech? A. Yes, I heard her say, I believe, that there was more democracy in Russia to-day than there was in this country.

Q. Did she say anything about the Kaiser, during her speech—that is, the German Kaiser? A. She mentioned the name "Kaiser," except I don't exactly recall in what connection she used it. I think she said the Kaiser was not paying for that meeting, and that they would be accused of it.

Q. Did you hear the defendant Goldman state that the Germans were not disappointed in the

Kaiser, they have a Kaiser, the kind of a Kaiser they want, and are going to stand for? Did you hear her—do you know whether she said that? A. I recall something said in regard to the Kaiser.

Q. Do you remember whether she said, "Democracy is the laughing stock before all Europe." A. No, she did not say it in that way.

Q. Do you remember whether she said, "Congress is in the hands of those who pull the strings, it is a jumping jack"? A. She may have said words to that effect. I believe she——

Q. (Interposing) Do you recall whether she mentioned the names of any Congressmen or Senators during that speech? A. No, I do not.

Q. Would you recollect it, if she mentioned the name of Senator La Follette during her speech? A. The name La Follette was mentioned. I think Mr. Weinberger mentioned that in talking.

Q. No, I am talking about Miss Goldman's speech. Unfortunately I did not get a copy of Mr. Weinberger's? A. I do not think Miss Goldman mentioned that name.

By the Court.

Q. Did Miss Goldman mention the name of any of the members of Congress—of the House of Representatives or the Senate? A. Well, I would not say she mentioned them. I don't recall that she did. I know she mentioned some Russian names.

By Mr. Content.

Q. Did she say this: "I am not afraid of prison. I have been there before"? A. I think she said something to that effect.

Q. Did she say: "You cannot stop the revolutionary spirit"? A. I think so, yes.

Q. Are you associated with Mr. Weinberger? A. No.

Redirect examination by Mr. Berkman.

Q. Do you remember the connection in which Miss Goldman said that, "I am not afraid of prison and I will say what I think"? Do you know in what connection she said that? A. I only recall it was part of her speech. I paid more particular attention to find out whether she was going to say anything in violation of the law, or not. I went up to see how far she would go.

Q. And do you remember her saying that she refused to advise people not to register, not because she is afraid of jail, but because she did not believe in advising people that way? A. I remember she did say that, yes.

By Mr. Content.

Q. Do you recall that distinctly? A. Well, not in those words, but to that effect, that she would not advise people not to register.

Q. Well, I thought you told us on direct examination very clearly, in response to several questions, put by myself and the Court, that she never mentioned the word "register" A. Well, I told you that. Now that Mr. Berkman recalls it to my mind——

Mr. Berkman: Does it refresh your memory?

By the Court.

Q. Is it your testimony that she positively stated— A. (Interposing) No.

Q. How do you know what I am going to ask you? Is it your testimony that she positively stated she would not advise people not to register? A. No, she stated in effect——

The Court: Don't give it in effect.

The Witness: That is all I can give you.

Q. You can give it either in her language or in substance. A. She stated then she was not there to give advise or to tell people what to do; that it was up to them to decide for themselves; and I believe that is what I meant when I said she did not advise them to register or not to register.

Q. Was the word "register" or "registration" used throughout the speech, that word—that is to say, either of those words "register" or "registration," in any connection? A. To my best recollection—my best recollection is now it was not used.

By Mr. Content.

Q. Then you answered Mr. Berkman improperly, didn't you? A. Well, I answered to the best of my ability. Mr. Berkman did not ask me whether the word "registration" was used.

By the Court.

Q. Well, do you say it was not used, or that that is simply your recollection? A. It is my recollection the word was not used, but I will not say it was not used.

Q. Is it your clear recollection, or— A. (Interposing) It is—to my best recollection it was not used, the word "registration," itself.

Q. Am I right in understanding that you went there to keep an appointment with Mr. Weinberger? A. I did.

Q. On some personal matter? A. Yes, on some personal matter.

Q. And I imagine you remained out of curiosity? A. Well, I went there out of curiosity, yes.

Q. Well, did you go for the purpose of seeing Mr. Weinberger, or for the purpose of attending the meeting? A. Why, I had an appointment with Mr. Weinberger, and he told me he would be there, and then I went as a matter of curiosity to see—I told him before I went, I said to him, "I am going to see how violent your anarchists can be," because

I knew he represented Miss Goldman and Mr. Berkman and some others.

By Mr. Content.

Q. You were with him during the trial of Kramer and Becker? A. I was.

By the Court.

Q. How do you know you knew he represented them? A. I know him for fifteen years. We belong to the same clubs, and we were brought up in the same neighborhood, and I take a personal interest in Mr. Weinberger. He belongs in my section.

Q. You did not understand my question. You say he represented them—how do you know that? A. Why, he told me, and I read it in the newspapers.

Q. You mean represented them professionally? A. No, as an attorney.

Q. Well, I say, didn't you know—you are an attorney, when I say professionally, that means as an attorney? A. Yes, professionally.

Q. You mean he represented them professionally? A. Yes.

Q. Well, in what way? A. Well, I knew that he was the attorney for the American Legal Defense League. I knew when it was organized, and I spoke to him about some things he did and was going to do. I looked over some articles he wrote before he signed them; and we have been working together for a good many years, and we have never been on the same side of the fence; Mr. Weinberger has always been a Republican while I have been a Democrat.

Q. Well, in this matter, what did you mean? You mean he was the lawyer for the defendants? A. He was the lawyer representing them in any proceedings that came on before the courts.

Q. I see. Had he represented them professionally, to your knowledge—don't answer anything you

Q. You can say yes or no. A. No.

Q. You were never present? A. Never present.

Q. Are you associated with him professionally? A. I am not.

Q. In any matter? A. No matter at all.

Q. When were you first asked as to your recollection of what took place at the Harlem River Casino? A. Why, I was never asked. I never spoke to Miss Goldman. I was subpoenaed the day before yesterday for this trial.

Q. Did you talk about that meeting to anyone? A. To anyone?

Q. Yes. A. Why, no.

Q. Did you recall speaking of it to Mr. Weinberger? A. I did, right after the meeting, as we went home.

Q. Did you speak of it since? A. I don't think so. I haven't had a chance to speak to him since.

Q. No, just say yes or no. A. No.

Q. So, since the night of the meeting, you never spoke to Mr. Weinberger about it? A. No.

Q. How often have you seen him since then? A. Oh, very often.

Q. When did you see him last? A. Saw him this morning.

Q. Where? A. At his office.

Q. Did he send for you or did you go there? A. Why, I got a subpoena, and I came down to his office, and I showed it—and he was very busy with some people and I ran over to the court. It was about ten thirty at that time.

Q. You got a subpoena? A. Yes.

Q. Who gave you the subpoena? A. It was mailed to me.

Q. Was there any mark on the envelope indicating from whence it was mailed? A. Why, it was a special delivery, reached the house, I believe, at about eleven or twelve o'clock that night, the day before yesterday.

Q. You don't understand my question. Was there any subscription on the envelope to show from where it was mailed? A. I couldn't say positively——

Mr. Content: Who the sender was?

The Witness: Yes.

Q. Yes, who the sender was? A. Who the sender was? Mr. Weinberger.

Q. You mean to say the envelope had his name and law office on it? A. Yes.

Q. Have you got that with you? A. No, I have not.

Q. See if I understand you correctly? You received a subpoena last night— A. (Interposing) No, the night before last. I did not receive——

Q. (Interposing) Well, a subpoena came by special delivery to you in an envelope with Mr. Weinberger's name and address on it? A. Yes.

Q. And after that, and until this morning, did you see him? A. I saw him this morning for a fraction of a second.

Q. Excepting this morning? A. No, sir.

By Mr. Content.

Q. Let me summarize this one thing: You stated on your cross-examination in response to questions both by his Honor and myself that the words "register" or "registration" were not used; then, Mr. Berkman asked you some question on redirect examination in which the word "registration" was used; and upon a recross I asked you about that, and you said Mr. Berkman refreshed your recollection; then upon further cross-examination you said it was still your best recollection that the word had not been used. Is that correct? A. That is correct.

BOLTON HALL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. What is your occupation, please? A. I am a land owner.

Q. No, your profession? A. I am a lawyer, but not in active practice.

Q. Mr. Hall, are you a native of the United States? A. No, I was born in Ireland.

Q. How long have you been in America? A. About forty-seven years, forty-nine years, something like that.

Q. Mr. Hall, have you known me for any length of time at all? A. Yes, perhaps for twenty or twenty-five years.

Q. During this time did you have occasion to receive letters from me? A. Yes, a number of times.

Q. In what form were the letters, were they in my handwriting or— A. Most of the letters as far as I remember, always were in handwriting.

Q. Mr. Hall, in receiving your letters, did you have any difficulty at all in reading them? A. Some letters, short ones, were quite legible. The long ones I always turned over to my stenographer to make a copy of because I found it was hard to make them out.

Q. You have just said you have known me for a number of years? A. Yes.

Q. We had many discussions during that time? A. Very many.

Q. On different subjects? A. Very great variety of topics.

Q. We did not always agree? A. I think we did not generally agree.

Q. Have you, in all the different discussions that you had with me, on different topics—did you ever hear me say, "We believe in violence and we will use violence"? A. No, I never did. I never heard anything to that effect.

Q. Did you ever see anything in my writing to that effect? A. No, I never did. I always gathered that you believed in education, and were trying to educate the people, and that only by the education of the people could we attain any real liberty. In that we agreed.

Q. Do you know whether during the time of our acquaintance I ever refused to openly stand for what I believed? A. No, I think you never did so refuse.

Q. Did you ever find me denying anything I stood for? A. No, I never have heard you denying anything you had previously avowed.

Cross-examination by Mr. Content.

Q. Did you know Miss Goldman in 1893? A. I think so, yes.

Q. Do you know that in 1893, in a public speech, Miss Goldman urged people——

Miss Goldman: I object.

Mr. Content: I have not finished my question.

Miss Goldman: I object. Any public speeches in 1893 have no connection with the charge in this case.

Mr. Content: He has been testifying that she never attempted violence.

By the Court.

Q. Did you ever hear a speech of Miss Goldman in 1893? A. I can't remember. I am not very apt at dates. I can't remember whether I heard such a speech at that time or not.

By Mr. Content.

Q. Did you ever hear a speech in which Miss Goldman urged the people to take what they wanted by force?

Miss Goldman: Objection.

A. No, I did not.

Miss Goldman: Objection withdrawn.

Redirect examination by Miss Goldman.

Q. I have not expected you, Mr. Hall, to remember all the speeches I made in twenty-four years, so I did not ask you about the speeches of that time, but you have heard me speak during a number of years in recent years, have you not? A. Yes, more often than in earlier years.

Q. Have you at any time heard me urge people to take things by force? A. No, I never have.

Q. Have you in any private discussion on different matters heard me express that I would tell people to take things by force? A. No, I never have.

Q. Of course, you know that because of some address I made many years ago, I was given a vacation in jail? A. I do, yes.

Q. You say you have not heard that address? A. No.

Q. You have not? A. No.

Q. I did not expect you had. Have you any idea for what I was held—I mean after that expression? A. I think it was on some general charge of the police, arising from inciting to violence, or something of that kind.

Q. Have you any idea whether the violence took place? A. No, no violence took place, so far as my remembrance is concerned. I do not remember about 1893, but no violence as far as I know has ever taken place owing to any expression of yours, or that can be traced, that I can find in an honest opinion expressed by yourself.

Q. And you have read pretty much everything I have written? A. Not everything, perhaps, but nearly everything, yes.

Q. Then, you don't know whether at that time I was held for quoting Cardinal Manning? A. No, I don't remember that.

By Mr. Content.

Q. You were not present at this speech? A. No, sir.

Q. Which caused Miss Goldman's vacation, were you? A. No, I think not.

Q. Then you don't know whether the violence existed or not, do you? A. Yes, because I should have heard about violence if it had, I think.

The Court: Well, the point is, you have no personal knowledge one way or the other.

The Witness: Except I think, being intimately acquainted with Miss Goldman, I think I would have known of it if any violence had existed, or ensued.

The Court: That is a deduction. The point is that you don't know anything about the speech, one way or the other, or what

followed of your own knowledge. I think you told us you were a lawyer by vocation?

The Witness: Yes.

By the Court.

Q. So that you can gather what the question means? A. Yes, I do. That is true.

Q. Then I have put it correctly, have I? A. I think so.

By Mr. Content.

Q. Did you hear from Miss Goldman later that she was convicted upon an indictment charging her with unlawful assembly and inciting to riot? A. I don't remember whether I heard that from her or not.

By the Court.

Q. Are you a subscriber to *Mother Earth?* A. Yes.

Q. Are you a subscriber to *The Blast?* A. No.

Q. How long have you been a reader of *Mother Earth?* A. Since it was published.

Q. What is your recollection as to how long that is? A. I think it must be about ten years.

Q. And have you engaged in some matters of public discussion yourself? A. Yes, many times I have engaged in matters of public discussion.

Q. Without going into details, what generally has been the character of your work in that regard? A. The advocacy of taxation of land values, the Henry George system of taxation condition generally which tended toward liberty, more especially with regard to free speech.

By Miss Goldman.

Q. One question I forgot to ask you. You were always interested in the question of free speech? A. Always.

Q. Are you a member of the Free Speech League? A. I am a member of the Free Speech League.

Q. And have you had occasion to lead in the fight for free speech? A. Yes, I have.

Q. Have you had occasion to lead in the fight for free speech in my behalf? A. Yes, I have.

Q. Mr. Hall, you have written a number of books? A. A large number—so many I am ashamed to mention them.

By the Court.

Q. Just for a little information. I don't know that it is very germane, but I have never heard of the National Free Speech League. Can you tell us what it is? A. A small number of persons who believe that there should be no restriction upon speech; that the person should be allowed to say what they choose, being, however, responsible for the consequences of whatever they say, be held to account only to the consequences of what they say when they are interrogated. Free speech is the best safety valve for discontent and anything else that there is, and we are not afraid to hear what anybody else has to say, however wrongminded we think he is.

Q. Then, the principle of that organization to which you refer, and information in regard to which was elicited by Miss Goldman's question, is that any person may say what he pleases, the responsibility being only as it happens as a result of saying it—is that it? A. That is it.

Q. That is a doctrine involving saying what one pleases, whether the law countenances it or not? A. I think it does. We think that the statute guarantees the right of free speech, and that it does not mean free speech limited, it means free speech.

Q. If I gather it correctly, your belief, in this organization to which reference has been made, is one which permits any speech whatever, whether such speech is contrary to an existing statute or

not? A. Well, we think that ought to be allowed. Whether it is judicious or not, that is another point.

Q. But, the defense of free speech, to which you have just referred, includes, as I understand you, the right to say anything you please, irrespective of what the law at that particular time provides. A. That I think would be real free speech.

Q. Well, I mean to state the doctrine of this association to which you belong, and which was referred to by Miss Goldman as yours? A. Well, I would not say the association lays down any doctrine. They simply stand for free speech.

Q. Then, have I correctly stated your definition? A. My definition?

Q. Yes. A. Yes, I think so.

JOHN F. SKELLY, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Your name is John F. Skelly? A. Yes.

Q. What position do you hold in the municipal service commission? A. Assistant secretary.

Q. Mr. Skelly, have you the record of William H. Randolph? A. Yes.

The Court: Now, I am very familiar with these things, and I think I can ascertain that for you.

Mr. Berkman: Yes, certainly.

By the Court.

Q. Now, you produce here a paper called "Application 77,746, index number 748, Examination 17"; then, "Notification February 5, 1907"? A. That's right.

Q. Now that application was received when? A. On January 28th, 1.10 P. M., in the year 1907.

Q. Now that application is signed William H. Randolph, 923 Brook Avenue, Bronx? A. Yes.

Q. In the body of the application what age is stated for the applicant? A. Twenty years of age.

Q. Now, what was the nature—this is from the Municipal Civil Service Commission files? A. Yes.

Q. What was the nature of the examination? A. For stenographer and typewriter, grade 1 and grade 2.

Q. Which is the higher grade? A. Grade 2.

Q. Now, what mark or percentage did Randolph obtain? A. Grade 1, 88.20%. On the grade 2, 88.20%.

By Mr. Content.

Q. May I ask what rating was given him May 9, 1907? I don't mean the date of the application. You gave us the date of the application before. A. Well, that was at the time of the examination, the list was promulgated. Of course, I don't know what that date is unless I look it up in the record, look up the records for that.

By the Court.

Q. Does that mean that he qualified? A. Yes.

Q. That means he successfully passed the examination? A. 70 per cent. is the required amount, and he received 88.20. Seventy would pass him.

The Court: Yes. Now, let the defendants see this paper.

Q. Now, what was the next examination of Randolph? A. Stenographer and typewriter, second and third grade. The list was established January 11, 1911. He passed the second grade examination with a percentage of 82.90. He was certified to the Board of Education on September 23, 1913,

but failed to report—that is, when he was certified, and received a certificate, he failed to report to the Board of Education, and consequently he was not appointed.

Q. That is, he failed to go up there to get the place? A. Yes.

Q. And therefore was not appointed? A. Yes.

Q. But the result of that, in turn, is that he loses his place on the list? A. Yes.

Q. Now, when was this application dated, Mr. Skelly? A. September 27, 1910, at 12.32 P. M. That was the date it was received, and the hour.

Q. And how old does he say he was then? A. Twenty-two years of age.

Q. And in giving his experience in other things, what, if anything, does he say as to employment in the Navy Yard? A. Four years, from 1907 to 1911, as stenographer and typewriter, appointed by the Secretary of the Navy, Navy Department, Washington, D. C., for duty in the Commandant's Office, Navy Yard, New York.

The Court: Now, we will pass that to the defendants.

Q. Now, did he apply again? A. Yes.

Q. He filed an application again for stenographer and typewriter? A. Second and third grade. The application was presented and received on March 26th, 1913, at——

Q. That looks like 2 P. M. A. Two P. M. At that time he gave his age as 25 years of age, with experience——

Q. Among other things, some experience in the Navy Department—I think it is five years? A. Five years.

Q. Did he pass that examination? A. Yes, he passed that examination, second grade 81.80%.

Q. And what was the date of the promulgation of the list? A. The date of the promulgation of the list was February 18, 1914.

Q. Now, at different times since 1907, have the examinations varied? A. Well, they did some, your Honor. That is to say, they are improving the conditions of the examinations, and make them so that they will fit the conditions as they arise each year.

Q. In the municipal service? A. In the municipal service. For instance, a person who passed the examination five years ago, or years ago, would not pass the examination to-day unless he was more qualified with knowledge of the examination.

Q. Well, in other words, is it fair to say, from your experience in the Municipal Service Commission, that it is constantly raising the standard of qualification? A. They are.

Q. And as time goes on, more severe tests are applied to the applicants? A. Yes.

Q. Is that a fair statement? A. That is a fair statement.

The Court: Now, Mr. Skelly has also brought Mr. Randolph's application for patrolman, and his per cent., but that has nothing to do with the stenography.

Mr. Content: Would your Honor introduce it, just to show when he was appointed patrolman.

The Court: Yes.

Q. Well, Mr. Skelly, you produce application No. 34,304, for patrolman. Is that correct? A. Yes.

Q. And the index number is 40,677, and what is the date of that application? A. This application was received July 12, 1910, at 12.49 P. M.

Q. And what was the percentage that Mr. Randolph attained in that examination? A. 88.48.

Q. And the passing mark for that is 70, too? A. Seventy per cent. There is also a physical requirement necessary in the patrolman's examination.

Q. In addition to the mental examination, and

qualifications in that regard, of course the officers have to pass a physical examination? A. A physical examination.

Q. But this mark is the same for his mental qualification? A. Seventy per cent. is the percentage mark, and he received a percentage of 88.48, and he was appointed to the Police Department on November 8th, 1911, and up to the present time is still in the employ of the Police Department, as far as our records show.

By Mr. Content.

Q. May I ask, have you your records there? Was the index number on the first examination 748—have you got that first record? Just give me the first examination, about which you have testified. A. The index number was 748.

Q. Now, I show you a letter addressed to William Randolph, 923 Brook Avenue, and ask you was this the regular notification of the Municipal Civil Service Commission? A. That is our form blank.

Q. That form is dated May 9, 1907? A. Yes.

Q. That would be the date of the notification that the applicant had passed; is that correct? A. Yes.

Mr. Content: I don't offer this letter in evidence.

Q. Just look at this notification, which I produce, and see what the percentage is—will you read it into the record—88.21? A. 88.21.

Q. That is right? A. That is right.

Mr. Content: This is the notification of May 9, 1907.

Q. Now, I show you another one, dated January 25, 1911, and ask for the index number of the second examination about which you testified—is the number 1446? A. Yes, it is.

Q. And is the grade that you have there? A. 82.90.

Q. That shows he passed with that rating? A. Yes.

Mr. Content: And this notice is dated January 25, 1911.

Q. Now, let me call your attention to this. You stated that in 1913 he was passed as a stenographer and notified to report, but he did not report? A. Yes.

Q. Wouldn't your records be explained by a reference to the fact that he was appointed a patrolman prior to 1913? A. Well, we don't know.

Q. Well, I mean by looking at your record now? A. Yes, we don't do that.

Q. You don't at all? A. Yes—we have so many positions they are all different lists.

The Court: It so happens that before that time Mr. Randolph was then in the police department, and his failure to report is perfectly explainable in having a position in the police department.

Mr. Content: That is just what I wanted to bring out.

Q. So that at that notification, in 1913, according to your records, he had been appointed a patrolman? A. Yes. May I explain? When a requisition is made upon the Civil Service Commission, by the Department, we certify the names to that Department. The Department in turn notifies the candidates to appear. If they do not appear within the period of five days, it is equivalent to their declining the offer. The Department then in turn notified the Civil Service Commission of the failure to report, of the man or the candidate, whoever he may be. We insert that in our records, so that if at any time any question should arise,

we refer to our records, and know just exactly what was the cause of this man's declination, or why he was not certified.

Q. Now, I understand, from your records, in 1913, when he was ordered to report by the Education Department, he had already been in the employ of the Police Department as a patrolman? A. He was.

Q. Now, is your third examination index number 2424, the third record about which you testified? A. It is 2424, the index number.

Q. And is this notification, February 19, 1914, correct, and he got a percentage of 81.80? A. 81.80 is correct.

Q. And from that I understand, in regard to the point which is in the question Judge Mayer asked you, the examination of 1914 should, in the course of events, be stricter than that of 1907? A. Yes.

By Mr. Berkman.

Q. Mr. Skelley, if I understood you, of course right, the percentage in the first examination of Mr. Randolph was 88.20? A. 88.20 is right.

Q. And the second was 82.90? A. Yes.

Q. That is a falling down, that is a decrease in percentage, that percentage decreased?

The Court: He says the standard has been constantly increasing, and he repeats that now.

Q. But, so far as these figures show, the percentage of Mr. Randolph decreased on the second examination.

Mr. Content: The figures speak for themselves. 81 is lower than 88. You can understand that.

Mr. Berkman: I wanted to be sure about the figures.

The Court: The figures are perfectly clear.

Q. And the figure for the final examination is still less, 81? A. 81.80, you are right.

Q. Mr. Skelley, you testified that Mr. Randolph took the examination as a third grade stenographer? A. Second and third grade.

Q. What is his percentage of speed—how many words a minute can he write? A. Of speed?

Q. Yes, as a stenographer—how many words a minute did he write? A. Well, the examination and advertisements called for 120 to 130 words.

Q. That is all, 130 the maximum? A. The maximum was 130. This is the advertisement; you may read yourself.

The Court: Yes, what date is that?

The Witness: March 12, 1913.

Q. Is it marked down there how many words Mr. Randolph wrote on his first examination?

Mr. Content: No, he has specified as to what the requirements of the examination were.

Mr. Berkman: Then we will figure that out.

The Court: You can't very well.

The Witness: All persons passing the examination will be rated as second grade stenographers and typewriters, all passing with a percentage of 81 will be rated as third-grade stenographers and typewriters, provided they also qualified on the 120 and 130 word tests.

Q. And 130 would have to be the maximum? A. Yes.

Q. He would have to have 100 per cent. to pass 130? A. No, they don't rate them that way, according to the number of words they write. There is a time limit, a speed limit, an accuracy limit.

Mr. Content: Is there a word requisite?

The Witness: Yes, and then they are rated on what we call weights in the examination.

The Court: Now, if you will permit me, I think I can make this clear. The examination of 1913, March 12, says, "Public notice is hereby given that applications will be received from Wednesday, March 12, 1913, to 4 P. M., March 20th, 1913, for the position of stenographer and typewriter, male and female, grades two and three"—I will omit immaterial matters—"the date of the examination will be fixed later. The several weights of the examination are as follows: Dictation 6, of which rapidity in taking shorthand notes will count two, and accuracy will count four; tabulation 2, and facility in deciphering notes; speed 1, in transmitting from plain copy to machine; spelling 1. 70 per cent. will be required for the dictation test, and 70 per cent. on all in the dictation test. Four ratings will be given, one of 100 words, one of 110 words, and 120 words per minute, and one of 130 words per minute, carrying the ratings respectively, of 70 per cent., 80 per cent., 90 per cent. and 100 per cent. on rapidity. In the rating carrying exactness, correctness of form, neatness, freedom from interlineations, alterations, etc., will all be considered. Time limits will be set in connection with each test."

Then it goes on with "they must furnish their own note books. All persons passing the examinations will be rated as second grade stenographers and typewriters. All passing with a percentage of 85 will be rated as third grade stenographers and typewriters, provided they also qualify on the 120 and

130 words tests. Salary from $600 to $1,650 per annum."

Now, in the other advertisements, in regard to the other examinations, they are the same general tenor, with, however, different details in a great many, and different tests.

Now, will you let me ask this one question.

By the Court.

Q. Of course, I know you are not in an examination department; but are you able to tell us whether the examination, in part at least, is conducted under the supervision of an expert stenographer? A. Well, by an expert examiner, who takes the time and who has the time in his hands, and announces to the candidates the time that they will be given for that particular paper, that is on that particular paper, and then they count the words per minute, so that they take the dictation, and the moment that the time is up the clock stops, and the announcement is made to quit.

Q. When all this is done, are the results of all that examined by a stenographer? A. No, by an examiner.

Q. I don't mean that, is he a stenographer? A. No, sir.

Q. Not necessarily? A. No, sir.

Q. I see. So that they decide by the translation by the applicant of his stenographic notes into readable English? A. Yes.

The Court: Is there anything else you want?

Mr. Berkman: Yes. There are complicated figures there that we would like the witness to tell us, as one familiar with these examinations. Please tell me what would be the maximum speed of words per minute at

which an applicant could write, to pass an 81.80.

Mr. Content: Now, how can he tell that? The man may have written five hundred words a minute. He testified to the requirements, that he should write not less than 120, and not more than 130, that is the requirement.

The Court: I can explain it to you, I am so familiar with the thing. The Civil Service Commission arranges certain ratings that are to be given to each thing. It is exactly the same, we will say, as an examination for entrance to a college, or an examination when a man is in college. So much is given to this subject, so much to that, so much to the manner in which a thing is done, and so forth and so forth.

So that when an applicant is submitted to an examination a regular Civil Service Commission examiner is assigned to that meeting, of course, but with the standard that has been given him, but of the percentage that the man should have, so much is for speed, so much is for accuracy, and so forth.

Now, there is no way of telling, so far as these records show, at least, the precise number of words that a man, a given candidate was able to write in a given time, excepting that in order to pass one of these papers, shown him, he must be able to write 120—between 120 and 130 words, or something to that effect. That is all there is about it. We could not any more figure out what he actually did than you could work out the legendary Chinese puzzle.

Now, Mr. Skelley has taken the totals of two of these examinations from the files. If you want them, you can have them. I will

read it—this is a little complicated—I call your attention to it in view of the fact that Mr. Skelley has called my attention to it, so that all the facts may be fully in evidence; in the examination where the applicant received 82.90, the list established January 11, 1911, on speed he received 90, accuracy 82, spelling 100, copying 74. Now, each of those is multiplied by the ratings that you heard me read before, so that it would be 90 multiplied by 2 is 180 for speed; 82 multiplied by five is 410 for accuracy; 100 multiplied by one is 100 for spelling; 74 multiplied by one is 74 for copying; that total is 764; transcription 65, making a total of 82.90.

Mr. Content: That is the same one about which Mr. Skelley testified?

The Court: Yes. Now, the last examination, where he received 81.80, Mr. Skelley has an extract from the records of the Civil Service Commission as follows: Third grade requires an average of 85 per cent., and 120 or 130 word test: 91 multiplied by one equals 91; 95 multiplied by 1 equals 95; 55 multiplied by two equals 1110; 87 for speed, multiplied by two, is 174; 87 for accuracy, multiplied by 4, is 348. That totals 644, with a result of 81.80.

Now, the third grade is higher than the second. The notification is for a third-grade stenographer.

On his transcript he transcribed the dictation given at 120 words a minute. He therefore failed to get the general average of 85 per cent. on the entire examination, required by the terms of the advertisement.

Q. Now, let me ask you about that. You found from the records they showed he took dictation at 120 words a minute? A. Yes.

Q. But on some other elements, like spelling, or other matters, he did not sustain that 85 per cent.? A. No, sir.

Q. Is that correct? A. That is correct.

Q. So that that was a passing examination for the second grade which fell a little under the third? A. Fell a little under the third.

By Mr. Content.

Q. May I ask, just as a summary, that he passed satisfactorily, the examinations on three different occasions? A. Yes.

By Miss Goldman.

Q. Can you tell us whether Mr. Randolph is a duly qualified stenographer in the Police Department now? A. He is a patrolman now, so far as I know, that is as it was.

Q. He is not a police stenographer then? A. No.

Q. Well, what I really wanted to ask you—you will pardon me if I don't use the exact terms—whether he is a qualified stenographer in the Police Department? A. He has never been appointed as a stenographer to the Police Department.

Q. He has not? A. No.

Examination by Mr. Berkman.

Q. I want to make sure, I did not hear everything. Did I hear him say Mr. Randolph passed or did not pass the last examination?

The Witness: Which examination?

Q. The last—I did not hear the year 1913, or something. A. He filed applications on three times, for the position of stenographer and typewriter, he took the examinations, and passed the three examinations. He also filed an application for pa-

trolman, and he passed the examination for patrolman, and was assigned as a patrolman and was reported as a patrolman.

By the Court.

Q. What percentage in that examination was given for one to become a third-grade stenographer? A. 85 per cent.

Q. And I will ask you again, for clearness, the lowest in grade is 1? A. Grade 1.

Q. And 2 is higher, and 3 higher than that, and so on? A. There is a fourth grade, where they take notes, a court stenographer.

MARY ELEANOR FITZGERALD recalled.

Direct examination by Miss Goldman.

Q. Miss Fitzgerald, a check of mine, signed by you, was brought into evidence? A. Yes.

Q. I want to ask you about the power of attorney which I gave you. Do you recall what was the particular occasion of my giving you the power of attorney? A. I do.

Q. What was it, please? A. It was on the 14th day of June that I went to the bank with you.

Q. You went to the bank with me? A. Yes.

The Court: 1917?

The Witness: 1917, June 14, 1917.

Q. What bank, please? A. The New York Produce Exchange, the Harlem Branch.

Q. I had intended to ask this question later, but I state it now: What was the occasion, why should I suddenly, since I never had given you power of attorney before—what was the occasion of my giving you power of attorney at that particular date? A. You had been threatened with arrest

by Marshal McCarthy, on the night of June 11, at the meeting at the Royal Palace on 114th Street.

Q. Was there anyone else at that meeting who suggested arrest? A. Mr. Content said he was sorry he was not an officer, he would like to arrest you.

Q. Then you went with me to the bank, and I gave you a power of attorney, expecting a possible arrest? A. Yes.

Q. Have you any knowledge whether I—do you remember my drawing any money? A. I do.

Q. How much? A. You drew a check on—you cashed a check for $500.

Q. Are you sure I cashed a check? A. Well, you drew——

Q. Drew some money? A. Drew some money from the bank, from your deposit.

Q. Will you please be good enough to say how I drew the check, the money? A. It was from a fund that you had of $3,000, out of which you drew $500, as I remember it, from that fund.

Q. What was done with the $500? A. $300 were turned over to the *Mother Earth* account, for the magazine, and $200 was a debt that you owed Mr. Berkman.

Q. In giving you the power of attorney, because of the threatened arrest, what was the purpose of giving the power of attorney to you? What was my conversation when I gave you the power of attorney? A. So that I would be able to write checks in case you were arrested.

Q. You said I drew $500 from a fund of $3,000. Did you have any knowledge of the source of that fund? A. I have.

Q. Where did it come from? A. It was given to you by a man named James Hallbeck, an old friend of yours.

By Mr. Berkman.

Q. After reading Miss Goldman's letter at the committee meeting of the No-Conscription League —Miss Goldman's statement or letter, whichever you call it—on May 23, at that meeting did the League take any decision with regard to registration, or its attitude upon registration? A. It did.

Q. What decision or position did the League take? A. That the League would not advise people to register or not to register, it was a matter of individual conscience.

Cross-examination by Mr. Content.

Q. You have testified to some alleged conversation I had with Miss Goldman on June 11. Will you please state that entire conversation between myself and Miss Goldman, and not fragments of it? A. As I remember it, I will try to state it to you. I think Miss Goldman——

Q. Wasn't I near the door? A. You were in the hallway.

Q. Near the exit? A. Near the exit. And Miss Goldman said to you, why are you hustling and pushing—or why do you allow the soldiers and police to hustle and push men, when you know they are over the age of this examination, 21 to 25, and you said that you were not a police officer, and Miss Goldman said, "You acted like one," and you said, "I am sorry I am not one, I would like to arrest you." I think I have stated it.

Mr. Content: I think that is fairly accurate.

Q. Would you allow me to ask this: It is my memory that Miss Goldman started the conversation, and not myself. Is that correct? A. Why, she said to you, why do you permit the soldiers——

Q. I mean, she spoke to me first, and not I to

her—I mean she spoke to me first, and then I spoke to her then. A. I think she spoke to you first.

Q. And that was as she was going out? A. As she was going out.

Q. And you were with her? A. Yes.

Q. And I was standing at the door? A. In the hallway, some distance from the door, going into the balcony, or the exit, and you were about halfway between in that hall.

Q. There was a hallway leading from the balcony? A. Yes, into some sort of a flight of steps.

Q. You had to go up a few steps to get to the hallway? A. Yes, but you were in the hallway.

Q. Near the exit? A. About halfway between the two doors.

Q. Up in the balcony? A. No.

Q. Is it true the Marshal was in the balcony at that time? A. Yes, we had just left the balcony at that time.

Q. Isn't it true that Miss Goldman asked me, "Mr. Content, this is an outrage, the holding up for registration cards of men of about forty years of age"? A. That is true.

Q. Something of that sort? A. Yes, men of that age, and older were.

Q. And didn't I tell her that was in charge of the Marshal, that I was a lawyer, not a police officer? A. I did not hear her tell you as to that.

Q. And then she said I acted like a policeman? A. She said you looked like an officer.

Q. Well, policeman, I think she said, and then didn't I reply, "I wish I were," I might lock her up? A. You said, "I wish I were, I would like to lock you up."

Mr. Content: That is it. That is right.

Q. That was the whole conversation. But you will admit I did not start anything myself? A. No, Miss Goldman did speak to you first, as a

public officer, you were there with the soldiers. And I think she felt you had the right.

Q. I merely expressed a great desire to lock her up, and not a threat? A. It can be turned either way, I suppose.

By Miss Goldman.

Q. Then you remember my asking Mr. Content as to whether it was necessary to hustle people by soldiers? A. Yes, I think so.

Q. Was I in any way discourteous to Mr. Content? A. You were not.

Q. I spoke quietly? A. You did.

Q. And frankly asked for information? A. You did ask for information.

Q. Was Mr. Content very courteous when he answered? A. Well, when he said, "I would like, —I wish I were an officer, I would like to arrest you," it was not a courteous tone.

By Mr. Content.

Q. That was after Miss Goldman said to me that I was acting like a policeman? A. You said that after she said that.

By the Court.

Q. You say that on May 23rd, the League came to a decision? A. Yes.

Q. Who was the chairman of that meeting, if there was one? A. I think Mr. Berkman was chairman of that meeting.

Q. Was any resolution put? Did anybody offer a resolution, "Resolved that the No-Conscription League do or do not do such things, such and such matters"? A. I don't know that it was put in the form of a resolution. When Miss Goldman's letter or statement was read, Miss Goldman's statement was read, then there was a general discussion, and some of the delegates from those anti-

militaristic leagues, some of the members of the No-Conscription League, some were for registration, and some against registration, and so on, and then finally I know that no stand was taken by the league.

Q. Now, that is a conclusion. Did anybody put the question to a vote, an aye and nay vote of the people there present? Now I am asking a very simple, direct question: Was any specific vote taken, an aye or nay vote taken? A. I don't know.

Q. You don't know? A. I don't know whether there was one or not.

Q. Will you say it was done, or that you don't know anything about it? A. I don't know whether such a vote, such an nay or aye vote was taken. I don't know that. But I do know there was discussion.

Q. But, answer the question. I am not asking for, I am not talking about discussion around the circle, but where twenty-five or thirty or forty or whatever number of people were there, you don't know whether such a vote was had? A. The form of a vote, I don't know.

Q. Do you know whether the question was put? A. The question was put, yes, and there was discussion on it.

Q. By whom—what was the question? A. The question whether—the stand the league shall take in this matter, whether they—this is as I understand——

Q. Who put the question? A. It all came up after reading Miss Goldman's statement.

Q. Who put the question? A. Mr. Berkman brought up the discussion.

Q. What did he say? A. Why, the statement was he was trying to bring out, to encourage the others——

Q. Just one moment. You have been here long enough now to know I am asking for words or

their substance. What did Mr. Berkman say? A. After Miss Goldman's statement was read Mr. Berkman made a few remarks of his position on registration, and asked for a discussion of the people that were in the room, which followed.

> The Court: All that has been brought out so far, as I understand the testimony—the jury will take their own view of it—is that some people said that they would not register, and some said they would.

Q. Now, I want to know if at any time in the course of that meeting a definite question was put to the persons present, and the persons there present answered that question in regard to a resolution not to urge people not to register. Now you can answer that yes or no, or state you have no recollection? A. I don't know whether it was put in the form of a vote, your Honor.

Q. Well, will you say you don't know or—— A. I was not in the room all the time, I was in the hallway.

Q. Now then, when you were at that meeting, so far as you were there, there was no such matter in distinct words framed and put to the persons to get the view of each and every person present? A. You mean about the letter?

Q. What I am getting at is was it framed in words—the language I am not particular about—"do you favor our interfering with registration?" or, "Do you favor our not urging people not to register?" Was anything in substance said to the persons present in that manner? A. The meeting—

Q. Answer yes or no. A. I don't know.

Q. You don't know? A. I don't know that we put it in that form. It was a discussion of the people, and they discussed whether——

Q. Now, answer my question. A. Whether it was put to those people—you mean put the motion to each to give his views on the subject?

Q. Yes. A. Yes, sir; but all that was an informal meeting.

Q. Can't you answer the question yes or no. A. Yes, sir; there was a discussion, that is all.

Q. Can't you answer my question? It is a perfectly simple question—was that put to that meeting? A. I don't know that it was put in that form.

Q. Was there any vote taken upon any proposition. I don't mean in formal language, but was there any vote taken so that you knew how each and every person stood? A. There was no vote taken like that. The different ones expressed their views, and they were not pinned down, and written down.

Q. There was no minute of any kind taken, any memorandum? A. No, there was not a vote, or a minute of the meeting. It was an informal meeting for discussion.

Q. Now, in addition to the members of the No-Conscription League present, there were these people you called delegates from other organizations? A. Yes, sir; they expressed their views.

Q. They had nothing to do with the No-Conscription League, did they? A. They came to——

Q. I don't care about that, but they had no part in the programme or the policy of the League? A. No, sir; they were in sympathy with our work, and they came in because we happened to have a conference there.

Q. But they had no part in determining the policy of the No-Conscription League, what it should be? A. No, they were independent, but they expressed themselves there.

Q. Is it your statement in answer to the question that the League, then, according to your testimony, passed upon what you have termed an informal discussion, is that your answer? A. You ask me what stand the League took, or passed at that informal meeting.

Q. Yes. A. It was an informal meeting, and at that time it was stated emphatically by us that

we should give no advice as to people registering or not registering, but it was not written down in the form of minutes.

Q. Was that ever written in any form, whether in printing or circulars, or anything else? A. I think some of the form letters we sent out had such a statement.

Q. You do think so. Do you recall which letter? A. I would have to look them over, but I am sure that some of the written matter contained that statement, that the matter of registration was left entirely to his own conscience. I think you will find that in our literature and matter.

By Mr. Berkman.

Q. You have been present on various occasions when I was chairman of the meeting? A. I have.

Q. Did I put any matter ever to a vote? A. No, sir; you did not.

Q. Why not? A. It is not the custom at anarchist gatherings.

Q. When I was chairman of this no-conscription informal meeting of May 23rd, did I on that occasion, or any other occasion, put any question in a formal manner? A. No.

Q. Did I only want each one person to express their views? A. Yes.

Q. Did I put any question in any form at all, that was formal like a regular meeting? A. No, the meetings were all informal.

Q. Is a vote ever taken at any of our meetings? A. No.

Q. Either public or private? A. No.

By Mr. Content.

Q. Do they ever put questions at an anarchist meeting? A. You mean ask questions, or a lecture.

Q. No, do they ever put a general question to the members present, to the audience in an anar-

chist meeting, a question that is submitted by the chairman—ever put a question to the audience to be answered affirmatively or negatively? A. Well, sometimes questions are asked.

Q. Now, do you say, as I understand you, that at an anarchist meeting you never put a question to a vote, is that correct? A. In our meetings, and planning our work, we do not have a formal vote, where we ask the person to say aye or no, etc.

Q. You do not? A. No, sir.

JAMES HALLBECK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. How old are you, please? A. I will be eighty years my next birthday, in November.

Q. Where were you born? A. In Sweden.

Q. How long have you been in this country? A. Fifty years and three months.

Q. Are you a citizen? A. Oh, yes; for forty years.

Q. How many years? A. Forty years.

Q. You are not in active business now? A. No.

Q. You have retired? A. Yes.

Q. You live on your income? A. My income is an annuity.

The Court: He has an annuity.

Q. Have you known Miss Goldman a long time? A. Yes, I think for nearly thirty years.

Q. Have you known Alexander Berkman for a long time? A. Not so long, I guess about three years.

Q. Did you ever see Mr. Berkman in San Francisco? A. Yes.

Q. Did Mr. Berkman ever visit you in your hotel at San Francisco? A. Yes.

Q. Do you remember a visit on one occasion in which Mr. Berkman explained to you that he wanted to publish a paper? A. Yes.

Q. In San Francisco? A. Yes.

Q. Did you contribute toward the publication of that paper? A. I did.

Q. For *The Blast?* A. For *The Blast.*

Q. Did you contribute on several occasions for *The Blast?* A. Yes.

Q. Contributed money? A. Yes.

Q. Various sums? A. Yes.

Q. Did you contribute in the past toward the *Mother Earth Magazine?* A. Yes.

Q. Were you interested in *Mother Earth?* A. Yes.

Q. And sent money now and then? A. Yes.

Q. You were living at the time in San Francisco? A. Yes.

Q. How long are you in New York? A. It will be one year the 11th.

Q. One year on the 11th? A. Of this month.

Q. On the 11th of this month? A. Yes.

Q. Do you remember seeing me in San Francisco before you left for New York? A. Yes.

Q. Do you remember how long you are in New York—do you remember I came from San Francisco to New York? A. Yes.

Q. Did you come up to see me? A. Yes.

Q. Do you remember the date approximately when you came up? A. Well, no; not exactly, I don't remember.

Q. Where did you come up to see me?

The Court: He says he don't remember. I will let you ask him the date. Perhaps that will help him.

Q. About the 19th of January, I think, I am not sure about that. It was about that time? A. All right.

Q. It was in January? A. In January.

Q. You came up where to see me? A. I came up to see you in Miss Goldman's.

Q. At Miss Goldman's office? A. Yes.

Q. At *Mother Earth?* A. Yes.

Q. Was that in 20 East 125th Street? A. Yes.

Q. In which room, if you know, Mr. Hallbeck? A. On the third floor, on the third floor.

Q. How many flights of stairs did you go up? A. No, no; it was on the second floor at that time, I remember.

Q. Was it in the back room? A. Yes.

Q. When you came in, did you ask for Mr. Berkman? A. I did.

Q. And they showed you into my office? A. Yes.

Q. Do you, or did you know I was any time interested in that prisoners' ball? A. Yes.

Q. Do you remember personally receiving ball tickets from me? A. I did.

Q. Do you know, or do you remember paying money for the ball tickets? A. Yes.

Q. Tell us what you did when you were sitting there talking? A. I gave a check to Miss Goldman.

Q. For how much? A. Three thousand dollars.

Q. The check was cashed?

Mr. Content: Was the check cashed, the question should be.

Q. I mean was the check cashed? A. (No answer.)

Q. When you gave the check to Miss Goldman for $3,000, do you remember saying anything?

Mr. Content: I object.

Q. What did you say to do with it? A. Helping the issue of *Mother Earth*, and lectures, etc.

Q. You said the money is for the purpose of issuing *Mother Earth*, lectures, etc.? A. Yes.

Q. Did the bank send the cancelled check back to you? A. Yes.

Q. Have you the cancelled check with you? A. Yes.

Q. Please produce it.

(Produced by witness.)

Miss Goldman: I would like to put that in evidence, your Honor.

Mr. Content: No objection.

The Court: Let the clerk mark it.

(Marked in evidence as Defendants' Exhibit A.)

Miss Goldman: The check is dated New York, January 23, 1917; it is from the Equitable Trust Company of New York. It is made out to the order of Emma Goldman, $3,000, and signed by Mr. James Hallbeck.

By Miss Goldman.

Q. Mr. Hallbeck, when you were courteous enough to hand me the check, did you or did you not say that it is for your work, Miss Goldman? A. Yes.

By Mr. Content.

Q. How old did you say you were? A. I will be eighty years in November.

By the Court.

Q. What has been your business, Mr. Hallbeck? A. A tailor by trade.

Q. How long have you been retired from business? A. About seventeen years.

Q. And you have this annuity, do you? A. Yes.

By Mr. Berkman.

Q. Notwithstanding your great age, Mr. Hallbeck, how is your memory? A. Pretty fair.

WALTER BRODIE, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Mr. Brodie, where do you live? A. I live at 228 South Third Street, Brooklyn.

Q. What is your occupation? A. I am a contributor to magazines.

Q. What magazines, for instance? A. I am a contributor to the *Atlantic Monthly,* the *Outlook,* the *Seven Arts,* and various other magazines; have also been associate editor of several magazines, but not at the present time.

Q. Are you connected in some way with the Red Cross? A. Well, I am not exactly connected, but some of my work is going to be used, is going to be sold for the benefit of the Red Cross, and some song of mine has been set to music for the benefit of the Red Cross.

Q. Have you something to do with a fund for the Belgian war sufferers? A. Why, part of my time has been spent for the amelioration of the poverty of professors and artists ruined by the war, that is to say, collecting funds for the benefit of Belgian professors and artists of schools ruined by the war.

Q. Have you also contributed work for the benefit of the Canadian wounded soldiers? A. Yes.

Q. Were you at the Harlem River Casino meeting May 18? A. Yes.

Q. Are you a native of this country? A. No.

Q. Where were you born? A. I was born in Russia.

Q. Where? A. Russia.

Q. In Russia? A. Yes.

Q. Had you attended any of our meetings before? A. No.

Q. That was the first meeting? A. That was the first meeting, that was the first time that I attended.

Q. That was the first meeting you attended? A. Yes.

Q. Did you hear Miss Goldman speak at that meeting? A. Yes, I heard her.

Q. You came specially to hear Miss Goldman? A. I came specially to hear the opinion of the organization, and organized opinion of the conscientious objectors, because I was a conscientious objector, and I wanted to know what to do in connection with registration, and I wanted to hear the organized opinion of conscientious objectors in regard to registration.

Q. In regard to registration? A. Yes.

Q. You say that that is the purpose with which you came to the meeting? A. Yes, sir; that was the purpose, in order to get advice, and find out, as I said before, the organized opinion of conscientious objectors in regard to registration.

Q. What was the advice received there? A. Well, I could get no definite advice on the subject.

Q. You did not get any definite advice? A. No, sir.

Q. You heard the whole speech of Miss Goldman? A. I heard the most, sometimes the noise drowned her, but the most important parts I think I heard.

Q. Did you hear her say, "We believe in violence and will use violence"? A. I heard nothing of that sort.

Q. You heard nothing of that sort? A. No.

Q. Did you hear anything that sounded anything like that? A. No, quite to the contrary.

Q. Please explain what you mean. A. I heard her repeatedly during the meeting, asking the audience to refrain from answering any attempts at violence on the part of the soldiers. Repeatedly I heard her say that.

Q. Do you remember what you heard her say? A. I heard her ask the audience that they should refrain from answering these attempts of violence on the part of the soldiers.

Q. Did you hear Mr. Berkman speak at that meeting? A. I heard him but I could not hear him very distinctly.

Q. Did you hear Miss Goldman tell the audience that she advised them not to register? A. No, that is exactly what I did not hear. I thought I would hear it, but I did not hear it.

Q. You came to hear that? A. I was under the impression that Miss Goldman stood for that, but I came to the meeting and found Miss Goldman did not stand for that.

Q. You thought Miss Goldman stood for the advice not to register, and you found she did not stand for that? A. Yes.

Q. So you must have been disappointed? A. I was disappointed.

Q. Were you disappointed in my speech? A. I did not hear your speech.

Q. Were you very anxious to get definite advice with regard to registration? A. Yes, that was the reason I went to the meeting.

Q. What did you do besides going to the meeting to get advice? A. Well, after, because I was unable to get definite advice at the meeting, I thought I would go over to the headquarters of the No-Conscription League, and find out whether they would give me definite information on the subject, whether they would give me any definite advice.

Q. You came to the headquarters of the No-Conscription League to get definite advice? A. At 20 East 125th Street.

Q. 20 East 125th Street? A. Yes.

Q. You went up there to get definite advice? A. I went for the purpose of getting definite advice on the subject of registration.

Q. Did you get definite advice there? A. I went up to the No-Conscription League——

Q. Did you see me there? A. No.

Q. Miss Goldman? A. No.

Q. You saw someone else? A. I saw two gentlemen who said they were connected with the No-Conscription League.

Q. Do you know who the gentlemen were? A. I don't know them by name. I remember them very, very slightly.

Q. You spoke to them for advice, from the No-Conscription League? A. I told them I was a conscientious objector, and that I was unalterably opposed to national conscription, but in connection with registration I was undecided, and wanted definite advice on the subject.

Q. You asked for definite advice, and what advice did they give you? A. They told me that they could give me no definite advice on the subject, but advised me to do exactly as my conscience demanded. Furthermore, they said that the opinion of the no-conscription leagues in the United States was divided on the subject, and several of them were in favor and several were not; and that the No-Conscription League in particular, also, was undecided on the subject, some of the members were in favor, and some of them were not, and so they decided to say that their position was to leave it entirely to the conscience of the individuals.

Q. So that you got no definite information? A. No.

Q. You got no advice there on registration? A. Yes, no advice.

Q. And they told you the League left it to the conscience of each individual, to go according to his best understanding? A. Yes.

Cross-examination by Mr. Content.

Q. Who were the speakers at the May 18th meeting? A. Well, I don't remember all of them, but

those I do remember were Mr. Berkman and Miss Goldman, and I think Mr. Weinberger, Mr. Leonard Abbott, and a few others, but I do not remember the others.

Q. Were you in court this morning? A. Yes, I was waiting for my turn.

Q. Did Miss Goldman, according to your recollection, make any mention of the word "register" or "registration," in her speech? A. Yes.

Q. What did she say? A. She said there were many men who will not register.

Q. She said that? A. Yes.

Q. Did she then give the source of her information in her speech? A. She did not. But that did not satisfy me.

Q. Did she say anything else about registration, to your recollection? A. Nothing else.

Q. Did she say anything about conscription? A. About conscription—I don't remember exactly, in exact words, but in general, she discussed it as being immoral and illegal.

Q. Did she mention the names of any American statesmen, Congressmen or Senators? A. I don't remember that.

Q. Do you remember whether she mentioned the name of La Follette? A. No.

Q. Did she say this, "How many people are going to refuse to conscript, and I say there are enough. I would count at least fifty thousand"? A. I don't remember any of the words that she said definitely. I can only remember the gist of what was said.

Q. Do you remember positively that she did not say this: "How many people are going to refuse to conscript, and I say there are enough. I would count at least fifty thousand, and there are going to be more, and they are not going to when only they are conscripted. They will not register"? A. I don't remember that.

Q. Didn't you say a minute ago she said a number of them would not register? A. Yes, I heard her say that, but I did not hear those words.

Q. How often was the word "register" or "registration" used? A. Only once, that only once, as I recollect.

By the Court.

Q. Are you sure about that, or is that just your present recollection? A. Well, I can only speak from my present recollection.

Q. I mean, would you say she did not say that, or are you merely stating your recollection that she said it once? A. I can only recall she said it once.

Q. I understand you to say she used the word "violence" in connection with the soldiers? A. Yes.

Q. And that word "violence" was used at what time? A. Well, I don't remember the exact time she did it, but I remember, as I said before, I can only remember the gist of what she said, a general impression, not exact words, and I remember she said repeatedly, urged the audience to refrain from answering the attempts at force or violence—I don't know which word she used—on the part of the soldiers, and I also remember of one time the word was passed along to the audience that the soldiers were going to begin some kind of a riot, and to be prepared, and not to answer it in any way.

Q. Well, you testified on the direct that you heard her say in effect that they were not to answer any attempts of violence on the part of the soldiers? A. Yes.

Q. Were any inquiries made by the audience as to whether they were in favor of registration or not? A. No.

By Mr. Content.

Q. The audience took no part then, or there was no question on registration, or not? A. No.

LEONARD D. ABBOTT, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. Mr. Abbott, what is your profession? A. I am a magazine writer.

Q. Are you connected with any particular magazine at the preesnt time? A. I have written for many magazines.

Q. Are you connected with a magazine now? A. At the present time I am a free lance writer.

Q. Mr. Abbott, have you attended any of the meetings of the No-Conscription League? A. I attended the initial meeting, at which the No-Conscription League was organized, two meetings, the two largest mass meetings.

Q. At the initial meeting, where did that take place—was that on May 9th? A. It took place in your apartments, I don't remember the exact date.

Q. May 9, I think. Can you remember, first of all, the purpose of that meeting? A. The conference was called to express our opposition to militarism, conscription, and to the war.

Q. Do you remember a discussion taking place on the subject of conscription? A. Yes.

Q. Was there any issue discussed in regard to a large meeting to come before the public? A. That was one of the chief purposes of the meeting, or conference, to arrange a public meeting.

Q. Do you remember anything else discussed at that time, in relation to the main purpose? A. Yes, we discussed the purpose of the League, the platform on which we stood, the principles we proposed to defend.

Q. What was the next meeting you attended, Mr. Abbott? A. The next meeting was the public meeting, the meeting in the Harlem River Casino, a public meeting.

Q. Did you preside at that meeting? A. I did.

Q. When I spoke, when you introduced me, and while I spoke, were you in a position to listen attentively? A. I was in a position to hear every word that was said by any speaker.

Q. Have you any recollection of my saying, "We believe in violence, and we will use violence"? A. I have not the slightest recollection of any such statement. In fact, I would say very confidently that if that statement is credited to your speech that night, it must be some kind of an interpolation. As I remember your speech that night pretty distinctly, and I do not remember any passage in your speech that would be relevant to that. It don't hitch up with your argument.

Q. Do you remember at any time in my speech, my telling people not to register? A. No, I have no such recollection. I do not remember that you said anything of that kind.

Q. How long have you known me, Mr. Abbott? A. About twenty years.

Q. In recent times, say since war was declared, have you any recollection of my discussing the issue of war? A. I have many such recollections.

Q. Have you any recollection of my discussing the question of the draft law order which was put out? A. I don't remember. We discussed, I remember, this question on many occasions.

Q. Do you remember any time in our discussion, my stating that I would tell people not to register? A. I remember very distinctly that you did not tell them not to register, because, like the last witness here, I was a little bit disappointed that you did not take a stronger and more uncompromising attitude in regard to the question.

Q. So, you were disappointed? A. I was disappointed that you did not come out more definitely and say to the people they should not register.

Q. Since you have known me so many years, Mr. Abbott, will you please tell the Court whether

you have received letters from me on a number of occasions? A. Yes, I have received a great many letters from you.

Q. Were they in my handwriting, sometimes? A. Yes, they were very frequently in your handwriting.

Q. You are a literary man, you said? A. Yes.

Q. Do you also read proofs? A. I do.

Q. You are used to reading manuscripts? A. I am.

Q. Do you find my letters very easy to read? A. I think your handwriting is rather difficult to read, especially for anyone that is not familiar with it.

Q. You also attended—I believe you did—or rather, did you attend the Hunt's Point Palace meeting? A. I did.

Q. Did you preside there? A. I did.

Q. Did you, during my address, hear me tell the people not to register? A. I certainly did not hear you tell them not to register.

Q. And you were disappointed because I did not tell them not to register? A. I did, particularly because I felt you would take a more extreme attitude than you did.

By Mr. Berkman.

Q. Did you hear Mr. Berkman speak at the Harlem River Casino? A. I did.

Q. You were chairman of the meeting? A. I was.

Q. Sitting where the chairman usually sits, and standing up to introduce people? A. That is correct.

Q. While I was not speaking do you remember seeing me on the platform? A. You are speaking of the first meeting?

Q. Harlem River Casino? A. Yes, I remember it. You were there as a speaker.

Q. In what condition was I? A. You had your crutches, and you remarked your foot was very sore. You sat near the piano at my left, and faced the audience.

Q. Did, or rather do you remember a few of my friends standing around me? A. I saw a crowd, mostly in front and around you, and a few sitting on the platform.

Q. Do you remember the purpose, why they were around me?

Mr. Content: Objected to. What has that got to do with it.

The Court: It has been stated several times that your friends were around you in order to protect you, to keep people from going on your foot.

Mr. Berkman: Yes.

Q. Did you see any soldiers come up to me, back there? A. I heard at various times during the evening that soldiers made efforts to get on the platform.

Q. And you heard me explain to the people that we will leave in plenty of time to let the soldiers on? A. Exactly so.

Q. And there were a few arguments about that? A. Possibly, certainly.

Q. You heard that soldiers sent up word, a message, asking for the floor. Was that message delivered to you? A. It was delivered to me.

Q. What was our reply to the soldiers? A. Our reply was that they could have the floor after the meeting was finished.

Q. Did you, or do you remember the meeting at Hunt's Point Palace? A. I do.

Q. June 4? A. Yes.

Q. That was the mass meeting following the mass meeting at Harlem River Casino? Were you chairman at that meeting? A. Yes, I was.

Q. As chairman, did you listen to the speeches of the speakers? A. I did.

Q. Did you hear any of the speakers talk about violence? A. I heard none of them talk about violence.

Q. Did you notice some soldiers in the gallery, in the boxes there, making some disturbance? A. I saw them throwing the bulbs on the speakers.

Q. Did you notice that happened when I was speaking? A. I did.

Q. Did you notice when I spoke direct to the soldiers? A. I notice you addressed your remarks, some of them, to the soldiers.

Q. While you were sitting and listening to my speech, did you understand that most of them, a good deal of my speech, was addressed to the soldiers? A. Certainly, I understood that and heard that.

Q. In a gentlemanly manner? A. You tried to reason with the soldiers, to prevent their assaults upon the audience and upon the speakers.

Q. My attitude to them was not one of involving violence, was it? A. It was one of conciliation and an attempt to prevent disorder at the meeting.

Q. Did I distinctly appeal to the common sense and reason and conscience of the soldiers? A. You did.

Cross-examination by Mr. Content.

Q. At the meeting on the 18th of May, did you hear Miss Goldman's speech? A. I paid very close attention, listened carefully to the whole speech.

Q. Do you recall the substance of the speech? A. I think I can recall pretty nearly everything.

Q. Did she mention the word "registration" to your recollection? A. So far as I remember——

Q. Whether she discussed the words "register" or "registration" to your recollection? A. She may

have mentioned the word "registration," but the point of the meeting was the vote against conscription.

Q. Was any vote taken upon any question by the audience? A. It was not, there was no vote taken by that audience.

Q. You attended—you did not see the stenographers at the May 18th meeting, did you? A. I did.

Q. Did you see any Federal officers there? A. I don't know whether they were Federal officers, I saw stenographers.

Q. They were not on the platform, were they? A. I think they were on the platform, no, they were——

Q. You have known me for some time, have you not? A. Yes.

Q. By sight, and to speak to? A. Yes.

Q. You didn't see me at the 18th of May meeting? A. I don't remember that I did.

Q. You did see me at the Hunt's Point meeting? A. I think I did, yes.

Q. Perhaps it may refresh your recollection if I say that I was on crutches, also? A. I don't remember seeing you distinctly at either meetings, but so far as the stenographers were concerned, I remember they were there. They were right on the platform. But I don't remember it so clearly, at the first meeting.

Q. Now, you went and introduced the various speakers at the Hunt's Point meeting, didn't you? A. I did, at both meetings.

Q. You stated in reply to one of Mr. Berkman's questions, that you were disappointed that Miss Goldman did not tell people not to register—that is, did not take a more definite stand? A. I say I was surprised.

Q. You did not use the word "disappointed"? A. I may have used the word "disappointed," but "surprised" is more accurate.

Q. You thought they were going to urge people not to register? A. I thought they were going to take a more extreme attitude than they did on this particular point.

Q. Well, on June 4, you knew that the law was a law, to the effect that people must register, of conscriptable age? A. Yes.

Q. So that it was your idea, that is to say, your expectation, that they would urge people to violate a definite provision of the law? A. I thought it was possible.

Q. Didn't you so express it, in effect, I mean? A. No, I was simply interested in knowing what attitude she would take in that case, whether they would or would not definitely tell people not to register.

Q. At that meeting the defendants were expected to present speeches, at that meeting? A. They were to present speeches.

Q. And I suppose you made a few introductory remarks, just occasionally from time to time, introducing a speaker, you would say a line or two as to who they were, is that correct? A. That is correct.

Q. On one occasion you read a written speech by a Roumanian woman, Mrs. Yuster? A. That is correct.

Q. Who was not a speaker herself? A. That is correct.

Q. You read that to the audience? A. Yes, I read that to the audience.

Q. So, this far I am correct? A. That is correct.

Q. Did you at that meeting which you attended, make these remarks: "I don't know how many young men will refuse to register and be conscripted to-morrow, but I do know that the young man who shakes off the bloody paw of militarism, when it is laid on his shoulder, who refuses to be shipped to the trenches of Europe, I do know that young

man is doing something that is of unquestionable value"—— A. Read me the passage again.

Q. If I make an error, just correct me: "I don't know how many young men will refuse to register and be conscripted to-morrow, but I do know that the young man who shakes off the bloody paw of militarism, when it is laid on his shoulder, who refuses to be shipped to the trenches of Europe, I do know that young man is doing something that is of unquestionable value, not only to himself, but to all humanity and to all posterity," and then there was applause. A. That passage is correct.

Q. I might say, for your information, that I am reading from the transcript of the stenographer employed by the No-Conscription League. A. That report is substantially correct.

Q. How about this: "The young man who out of a keen sincerity"—— A. Out of a clean.

Q. That is "keen" there. You say it is "clean"? A. Yes.

Q. (Reading) "The young man who out of a clean sincerity and idealism, refuses to take arms in a cause in which he does not believe, is stronger than any or all the governments that ever existed." A. That is correct.

Q. (Reading) "Down with militarism." Is that correct? A. Correct.

Q. (Reading) "And down with the state that cannot maintain itself except by forced service." Is that correct? A. Correct.

Q. Then, the first speaker that you introduce, I notice that you say, "The first speaker is a young man of conscriptable age." A. Correct.

Q. And this speaker, Mr. Kane, the next speaker, according to your introduction, said in regard to registration, "Any attempt to violate the laws of true democracy should be crushed by the will of the people who love democracy, and to-morrow, on June 5th, you will have your opportunity to crush

those laws that destroy democracy." A. I think he said that.

Q. Mr. Kane did? A. I think so.

Q. Did Mr. Kane further say this: "I cannot allow any law to interfere with the freedom of my conscience." A. I think he said that.

Q. Now, did you in reading Mother Yuster's speech, or rather did you state in speaking for her, "We will never allow our sons to be conscripted," or did she say that through you as a mouthpiece? A. I think she did.

Q. In introducing Mr. Berkman, did you introduce him in these words: "A man who went to prison for fourteen years in the fight for liberty." A. I certainly did say that.

Q. Now, Mr. Abbott, you have contributed from time to time to Miss Goldman's magazine, *Mother Earth?* A. I have.

Q. Did I understand you to state on your direct examination that Miss Goldman did not advocate violence at any time? A. I don't know whether the question was put to me in that form.

Q. Well, in your various speeches, with Miss Goldman, did you ever discuss this question? A. I have never known her to advocate violence.

Q. In her magazine, *Mother Earth,* the July issue, 1914, did you contribute an article entitled "Leonard D. Abbott's Speech," or rather was your speech at Union Square published? A. Yes.

Q. Now, let me ask this preliminary question: In July, 1914, to your knowledge, was Miss Emma Goldman the publisher of *Mother Earth?* A. She was.

Q. You knew that at that time? A. I did.

Q. And at that time was Mr. Alexander Berkman the editor of *Mother Earth?* A. If I remember, at the date when that particular issue was published, Emma Goldman was thousands of miles away.

Q. But she was the publisher? A. She was the publisher.

Q. And Mr. Berkman was the editor? A. Yes.

Q. Having an office at that time at 74 West 119th Street, New York City? A. Correct.

Q. Now, in that magazine, was your speech given in Union Square published? A. It was.

Q. And your speech appears on page 140—I will show it to you. A. That is all right.

Q. You gave this—have you ever read it? A. I have. That is a correct transcript of my speech.

Q. It was published in July, 1914, in *Mother Earth?* A. Yes.

Q. And at that time Miss Goldman was the publisher and Mr. Berkman the editor? A. Yes.

Q. Was Mr. Berkman here at that time? A. Mr. Berkman was here at that time.

Q. At the time in Union Square when you made your speech? A. He was.

Q. And he also made a speech on that occasion? A. Yes.

Q. And you were on the platform there together? A. We were.

Q. And some other speakers, including—I think Mr. Berkman was the first speaker? A. As I remember, it was he.

Q. And then you followed? A. Yes.

Q. And then Miss Rebecca Edelsohn? A. Yes.

Q. And in the meeting, you referred to a memorial meeting? A. Yes.

Q. And then Miss Rebecca Edelsohn spoke? A. Yes.

Q. And then Miss Elizabeth Gurley Flynn?

Mr. Berkman: The defense admits it all.

Q. According to your recollection—I am only asking for that, did Miss Elizabeth Gurley Flynn speak on the same occasion? A. She did.

Q. And a man named David Sullivan? A. He did.

Q. And a Charles Robert Plunkett? A. He did.

Q. So that on this occasion, in this issue of *Mother Earth*, everybody's speech was published? A. Yes.

Q. And in this issue of *Mother Earth* your verbatim speech was published? A. Yes.

Q. And I have shown it to you on page 140? A. Yes.

Q. Did you contribute an article to *Mother Earth*, on page 156, called, "The Fight in Tarrytown and its Tragic Outcome"? A. I did.

Q. Is it true that at this meeting a telegram from Emma Goldman was received, this meeting in Union Square? A. Yes.

Q. Was Mr. Pietro Allegra a speaker also, in the Italian language? A. He was.

Q. Louis Fraina? A. I think he was there. I don't remember him speaking.

Q. Now, in this article, I don't want to read the whole article, and the only point I want to reach is this in reference to violence—did you say this: "Whether Arthur Caron and his friends decided to resort to violence, I do not know. But if they did, are they to be blamed? Let him that is without the spirit of resistance to tyranny and outrage, cast the first stone. If Caron decided to employ violence upon his enemies, and upon the enemies of his class, he did so only after he had exhausted peaceable methods." A. I certainly might have said that.

Q. That is a correct transcript? A. Yes.

Q. That was published in *Mother Earth*, according to your recollection? A. That was a correct transcript of what I said.

Q. Now, in the same issue of *Mother Earth*, do you recall the publication of Rebecca Edelsohn's speech? A. Yes.

Q. Were you present when she delivered the speech? A. Yes.

Q. And Mr. Berkman? A. Yes.

Q. In Union Square? A. Yes.

Q. Do you recollect—I ask for your recollection—did Miss Edelsohn say this, with reference to Arthur Caron, Charles Berg and Carl Hanson, who were killed in an explosion: "But this we do know: whatever the cause of their death, whether they died at the hands of the enemy or because of the premature explosion of a bomb, they died in the interest of the working class. Therefore they are our comrades, no matter what the cause of their death." A. According to my memory, that is a correct transcript.

Q. I am only asking for your best recollection. A. Yes.

Q. You appreciate I am reading from *Mother Earth?* A. Yes.

Q. And if *Mother Earth* is wrong, I shall be glad to be corrected.

Q. How about this: "If it was a premature explosion, then it is not our comrades that we must be ashamed of; it is society at large that should be ashamed, society that forces the best men and women to forfeit their lives in order to gain a few more liberties." A. So far as I remember, that is all right.

Q. Now, in another place, on the same page, 145, "I want to say that it's about time the working class came out frankly and openly and said, 'Yes, we believe in violence; we will use violence whenever it is necessary to use it. We are not afraid of what your kept press says; and when we are murdered and cannonaded, when you train your machine guns on us, we will retaliate with dynamite.'" Is that according to your recollection? A. According to my memory she said something of that kind, yes.

Q. And then after that she says, "And I hope that the day is not distant when the working class will say, 'We are not afraid of using violence. Every hour that we work in the factory we are

kept there by violence, because we are forced to live under your rotten capitalistic system' "? A. Yes, I think she said something of that kind.

Q. And then a further remark: "But the real revolutionists are not afraid of the word violence, nor even of the word dynamite"? A. I should think she said something of that kind.

Q. And this further remark—this is the ending of her speech: "Don't be afraid of violence when the violence is on the side of the laboring class. The only thing is: Use it when you have the power, and when you have enough of it." A. I think she is quoted accurately.

Q. Now, at that meeting, was there another speaker, Charles Robert Plunkett? A. Yes.

Q. Do you know Mr. Plunkett? A. I do.

Q. Do you remember at that meeting that he said this: "I care not what position others may take; I have often from this platform and from other platforms in this city, declared that I believe in violence, and I have no reason to retract that statement now. I cannot answer for others, I can speak only for myself; as for me, I am for violence. Not only defensive violence, but offensive violence." Do you recall that? A. I do.

Q. Is that substantially according to your recollection—that is, that you are convinced of its correctness? A. Yes.

Q. And this was about three years ago? A. July, 1914.

Q. (Reading) "I am not afraid of proclaiming the probability that our comrades met their death while preparing to strike a blow of terror at the heart of the enemy." Do you recollect that? A. I do.

Mr. Berkman: The defense admits everything in *Mother Earth*.

Q. (Reading) "To oppression, to exploitation, to tyranny, to jails, clubs, guns, armies and navies,

there is but one reply: Dynamite." That is according to your recollection? A. Oh, yes. May I comment on that?

Q. Certainly. A. Plunkett and Miss Edelsohn at that time believed in violence, we believed in free speech, and it was their privilege to express what they felt and thought at that time.

Q. According to Mr. Berkman, did he believe in violence at that time? A. Mr. Berkman's speech was recorded in the same issue.

Q. Did Mr. Berkman, according to your recollection, say as follows: "It was the same speech —"

Miss Goldman: I ask the Court whether I may at this stage make a small remark?

The Court: No, you can only make an objection.

Mr. Berkman: Well, I object.

Mr. Content: On what ground?

Miss Goldman: It is this, that the charge is advising people not to register, and it seems that here we are being tried for speeches made by somebody else in 1914. The speeches are being read into the testimony, and the jurymen here hear these speeches. I am not clear myself, and don't expect anyone else to be clear, on what I am being tried for just now.

The Court: The question as to violence, so far as that is concerned, is only on the question of credibility. You are not being tried for violence, you are not being tried for any infraction of the law in that record. A man has been on the stand and has testified that he took down in stenographic notes certain expressions, and testimony has been introduced to the contrary, to the effect, briefly stated, that the defendant Emma Goldman has repeatedly stated that she is against violence. Now the Government has the right, as I said before, to bring forward

any writing on the question of credibility, which shows the contrary, if it does show it.

Now, the defendant Emma Goldman was the publisher of the paper in question, and the defendant Alexander Berkman was the editor, and he can only inquire as to what was recorded in the paper, not as to anything else. I have also explained, I think clearly, the question as to credibility, and when the matter comes, when the time comes, I will instruct the jury to the effect what I am saying now, among other things.

None of the defendants is now on trial for any act of violence, and this simply goes to the question of credibility.

Mr. Content: I would like to offer in evidence Government's Exhibit——

Miss Goldman: One moment. Would it be a test of credibility, if it was shown at this trial, for instance, that one of the defendants made a remark which could be construed as contrary to her teachings, and ideas—could it be proved that she did make it, but it is in the statement of somebody else?

The Court: You are getting into the realm of argument now. I have endeavored to state the law clearly throughout this case, and I will, of course, and it will be properly stated to the jury when the time comes.

Miss Goldman: I take exception to the ruling, and you understand that we do not object to anything being put in evidence.

The Court: In order to protect your interests, your objection should be made more formal.

Make it this way: That the defendant objects to this line of evidence as irrelevant and immaterial, and the Court overruled the objection, and to each defendant reserves an exception.

Mr. Content: May I just say this one thing now, on this testimony, that the defendants' evidence opened up first this line of testimony.

The Court: Obviously, else I would not have permitted you to go as far as you have.

Mr. Content: Now, I offer in evidence Government's Exhibit 55 for Identification, which is a bundle of *Mother Earths*, testified to as having been found in Miss Goldman's office, that is to say, *Mother Earths* of July, 1914, found on the day of the arrest, this being one of them I hold in my hand.

The Court: Very good, it will be received.

(Marked in evidence as Government's Exhibit No. 55.)

Mr. Content: I think it would relieve Mr. Abbott, if I just read Mr. Berkman's speech on that occasion. (Reading same to the jury.)

Mr. Content: I will read on page 157, the article of Alexander Berkman (reading same).

I also want to read Emma Goldman's telegram, at page 154, at that meeting at Union Square.

Q. Are you an anarchist? A. It depends on what you mean. I am, if I can define it.

Q. According to your definition? A. According to my definition, yes.

By the Court.

Q. I understood you to say in your direct examination, in answer to the questions of Miss Goldman, that at the second meeting, the one at Hunt's Point, you were surprised she had not taken a more extreme stand—I think you said that, or words to that effect.

Mr. Content: He said at both meetings.

The Court: I know that, but I am asking him as to Hunt's Point. Is my memory right on that?

A. Yes, that is correct.

Q. Now, you were at the meeting on May 9, the meeting of the No-Conscription League, when it was organized? A. I was.

Q. I gather you were not at the meeting of May 23rd, at Miss Goldman's house? A. At the private meeting?

Q. Yes. A. No.

Q. Between the date of May 9, and the date of the Hunt's Point meeting, which was June 4, had you seen the defendants? A. Why, I had probably some conversations with them, no extended conversations.

Q. You had some conversations? A. Yes, some conversations.

Q. Well, what event, if any, or what conversations, if any, had taken place which led you to expect that at the Hunt's Point meeting there would be what you have characterized as a more extreme stand on the question of registration? A. That impression was simply based upon my knowledge of her deportment and character, not upon any conversation.

Q. That is rather general—I don't quite understand what you mean by that. A. Well, I mean there was nothing that she said to me, or I said to her, which would lead me to suppose she would oppose registration, but we were in a period of intense emotional excitement, and it was a moment when a person who is extreme may be led to make extreme statements, and it was in that sense I thought perhaps she might be more extreme than she was.

Q. Now, that Hunt's Point meeting was held on the eve of registration day? A. It was.

Q. Have you any idea how large an audience was present? A. Well, the hall was full. I do not know how many people the hall holds, but it was full.

Q. Is it fair to say there were several thousands there? A. Several thousands, yes.

Q. And were they men and women of all ages? A. Yes, they were.

Q. When you looked around, did you see, or did it seem that there were some young men there of the so-called draft age, within that age? A. There were.

Q. Many of them? A. There must have been quite a few.

Q. Were there persons strangers to you, as well as persons that were known? A. There certainly were.

Q. Young men, among those, young men? A. Many young men I had never seen before.

Q. Now, at the meeting of the 18th of May, were there at that meeting many young men? A. There were.

Q. Would you say, from appearances, that they were between the ages provided for in the Draft Law? A. There must have been some young men of that age.

Q. Did you see them? A. Yes.

Q. Were there strangers to you also there? A. Many of them were strangers to me.

Q. Were you present at any time when it was determined to have the meeting on the eve of registration? A. I don't think I was present at any outside of the meeting at the *Mother Earth*, but I knew in general that the meeting was to be held, and the first plan was to hold it in Madison Square Garden.

Q. Were there any circulars given out in the meeting? A. I don't know anything about that personally, about the giving of circulars. I have no doubt some were given out.

Q. Did you see any given out? A. No, sir, I did not.

Q. I only want you to give your personal knowledge. A. I have no direct personal knowledge on that.

By Miss Goldman.

Q. Do you know this book? A. I have read it very carefully.

Q. And it represents a series of essays on— A. The principles of anarchism.

Q. From my point of view? A. Certainly.

Q. Do you recognize what this one is? A. The psychology of political life.

Miss Goldman: I would like to offer that in evidence.

The Court: Yes, it may be received.

Mr. Content: No objection.

Miss Goldman: May I also at this point bring in evidence volumes of *Mother Earth*, containing my policy, or our policy on war, liberty, etc.

The Court: Certainly. Just hand them to the clerk, and he will mark them.

Miss Goldman: This is an essay on patriotism.

The Court: I can make it very simple. I will receive the whole book in evidence, and leave it to you to read such parts thereof as you may care to do. In other words, there may be some parts of it that are quite irrelevant. But everything that is in the book that is relevant, you may read, and the book for that purpose may be taken in evidence entirely.

(Marked in evidence as Defendants' Exhibit B.)

By Mr. Content.

Q. You said certain literature was distributed at the meeting? A. I heard it was.

Q. You don't know of your own knowledge? A. No.

Q. You did not see it yourself? A. I did not.

(Whereupon the trial was adjourned to July 6, 1917, at 10 A. M.)

New York, July 6, 1917, 10 A. M.

Trial resumed pursuant to adjournment.

Present:

The Court, counsel and jury, same as before.

Mr. Berkman: We put in evidence issue No. 2, volume No. 1, of *The Blast*, January 22nd, 1915.

(Marked in evidence as Defendants' Exhibit C.)

The Court: Just a moment. I have a memorandum here. Do you want to put in the whole number, or only this article referred to?

Mr. Berkman: The articles and papers of *The Blast* on page 4, "What is the matter with labor?" Page 4.

The Court: Very good. "Aspirations of *The Blast*," and the article entitled, "What is the matter with labor?"

Mr. Berkman: The first volume, Vol. 1, Issue 5, February 12, 1915, page 4.

(Marked in evidence as Defendants' Exhibit D.)

The Court: That is a very little one, No. 5. What are the articles?

Mr. Berkman: The page 4 articles.

The Court: The articles on page 4, entitled——

Mr. Berkman: "The Madness of Jingoism" and "Prepare, Prepare." The third article is "To Work Levels."

The first volume, issue 17, August 15, 1916, two articles, one called "Down with the Anarchists," page 5, and another one "Violence and Anarchism," page 4.

(Marked in evidence as Defendants' Exhibit E.)

The Blast, volume 2, issue 51, June 1, 1917, page 3, "Der Mutter."

Mr. Content: Your Honor, this whole article is in evidence already. I don't think it is necessary to re-operate. I did not read that story, but Mr. Berkman can read it, but it is already Government's Exhibit in Evidence.

The Court: Very well. You need not give it a separate number.

Mr. Berkman: *Mother Earth*, volume 9 and 10, if the Court please, I have several articles marked there, but we can simply mark the whole thing.

The Court: Very good.

Mr. Content: Volumes 9 and 10—I beg your pardon, volumes 8 and 9.

The Court: Yes, 8 and 9, not 10.

Miss Goldman: I am putting in 10 later.

The Court: Very well, just get it straight. Volumes 8 and 9 are offered by the defendant Berkman.

(Marked in evidence as Defendants' Exhibit F.)

Mr. Berkman: *Mother Earth*, volume 5, No. 10, December, 1910, page 309: "Definitions."

(Marked in evidence as Defendants' Exhibit G.)

LEONARD D. ABBOTT resumed the stand.

By Mr. Berkman.

Q. Mr. Leonard D. Abbott, were you present at various meetings, public and private, where I was chairman? A. I was.

Q. In years past, I mean? A. Certainly.

Q. And in recent years? A. Yes, certainly.

Q. When I am chairman, do I ever call for a vote on any question? A. I don't remember that you have.

Q. Did you ever hear me call for a vote? A. No.

Q. Do you think it would be consistent in me to call for a vote when I am chairman? A. No.

Q. At a No-Conscription League meeting, is a question ever put formally to the meeting? A. I was never present at any meeting at which the minutes of the board were put in the form of a vote.

Q. When I am chairman, was the question ever put to a vote? A. I have never been present at any meetings at which you as chairman put a formal vote.

Q. Never since you know me? A. No.

Q. How long have you known me? A. About twenty years.

Q. Have I been chairman on many occasions? A. You have.

Q. Now, Mr. Abbott, we heard yesterday about speeches made at Union Square, and mass meetings in 1914, and speeches referred to from that particular meeting. Can you tell us what was the occasion that caused us to call this meeting at Union Square—was there a strike or any other affair of that kind? A. The meeting at Union Square was the direct result of the strike of the miners in Colorado against the Rockefeller mines in Colorado, and it was also the direct result of the massacre of the working people and the burning alive of women and babies in the strikers' camp in Ludlow, Colorado.

Q. That mass meeting was not an ordinary affair, was it? A. It was a very extraordinary affair.

Q. Called under very unusual and special circumstances? A. It was called under the stress of intense indignation for what we regarded as the outrages upon the miners in Colorado.

Q. Was that indignation felt throughout the country?

Mr. Content: Objected to.
The Court: Sustained.
Mr. Berkman: Exception.

By the Court.

Q. In your answers, are you referring to the meeting at which the speeches were made to which reference was had yesterday? A. Yes, sir, I am referring to the speeches to which reference was made yesterday.

By Mr. Berkman.

Q. That particular mass meeting was at Union Square? A. That's right.

By the Court.

Q. Now, let me interrupt you in order to make that clear. The meeting apparently was held in memoriam, or something like that, on account of three men killed, Caron, Hansom and Berg. Now, who were they? Who were those three people? A. These young men were agitators and proponents in this fight against the Rockefellers at that time.

Q. Under what circumstances did they die? A. They died in a bomb explosion in Lexington Avenue.

Q. In this city? A. In this city, yes.

Q. I mean what happened— A. Well, these young men were killed in Lexington Avenue in connec-

tion with a bomb explosion that was never entirely explained.

Q. That is presumably a dynamite bomb? A. Yes.

Q. Were they the makers of the thing? A. What happened was never known, or was never explained. The thing was always more or less of a mystery.

Q. Then there was an explosion of a dynamite bomb in Lexington Avenue? A. Yes.

Q. Did these men live there at the place? A. These men lived there at the place.

Q. The three men who were killed lived at this place in Lexington Avenue? A. They did.

Q. The same dynamite bomb which exploded, was the one by which they were all killed? A. That is correct.

Q. Was the building blown up? A. It was.

Q. Anyone else killed? A. I think one other woman was killed.

Q. And did these three men live together? A. I don't think so.

Q. Well, they were associated? A. Yes.

Q. And this meeting at which those speeches were heard or delivered— A. Was as a result of the death of these men.

Q. That was in memoriam of these men? A. That is correct.

Q. There was nobody at the mines in Colorado killed there, as far as anybody knows? A. But these men were protestants against the Rockefellers, whom they held responsible for that crime.

By Mr. Berkman.

Q. Mr. Abbott, do you remember whether the District Attorney's Department of New York City made an investigation of that affair? A. I remember they made a very lengthy investigation of the whole affair.

Q. Of that explosion? A. Of that whole explosion.

Q. Did they determine whether it was the agents of Rockefeller who caused the death of these men, or did they determine anything else in the matter? A. Well, as far as I know anything about the matter, it was left a mystery, was never clearly brought out, the facts in the matter. There were no further arrests made, no arrests, in fact, made in connection with it.

Q. Were there any arrests made in connection with these explosions? A. No.

Q. Was it not charged at this mass meeting in memoriam, of these explosions, that these men died as victims of Rockefeller? A. It was so.

Q. Were any arrests made as a result of those speeches we heard yesterday? A. There were no arrests made.

Q. Were representatives of the Police Department here, of the City Department, present at that meeting in Union Square? A. They certainly were.

Q. Were they there in force? A. They certainly were.

Q. Were there five approximately, or approximately a thousand? A. There were a great many, I can't tell how many.

Q. Was there representation from the Detective Bureau? A. There was, certainly.

Q. For the Mayor? A. Yes.

Q. Were they near the platform? A. They were.

Q. And they heard the speeches? A. Took them down.

Q. Did they arrest anyone? A. They arrested nobody.

Q. Neither on that occasion or subsequently? A. No further arrests, no arrests were made at that time.

Q. Were any arrests in connection with that meeting made at any time? A. No.

Q. Those speeches which were read here, and as they appeared in the *Mother Earth* paper, do you consider them, from your knowledge of *Mother*

Earth, and from your knowledge of speeches—that is, that the *Mother Earth* articles——

> Mr. Content: I will concede, to help Mr. Berkman out, that the speeches from which I quoted to the jury, and some of which I read to the Court and jury, contained in the May issue of *Mother Earth* are verbatim remarks of the speeches in the Union Square demonstration, July, 1914, Government's Exhibit 55, are verbatim reports of the speeches at the Union Square demonstration; but, Mr. Berkman, some of the things I read were independent articles, but those things in Government's Exhibit No. 55 which are labeled "Alexander Berkman's opening address" and "Leonard Abbott's address" I will concede that they are the verbatim remarks of the speakers at the Union Square meeting. That is correct, is it?
>
> The Witness: Correct.

Q. Do you know whether the Post Office Department held up *Mother Earth*, or confiscated, or did anything—made any complaint with regard to publishing these reports of the mass meeting? A. No, sir, the Post Office Department did not hold them up or take any action in the matter.

Q. Absolutely no action in the matter? A. No.

Q. Do you remember whether there was any agitation in the East, and in New York especially, with regard to that Colorado strike of the miners? A. Why, the whole country was full of agitation.

Q. It was a very exciting time? A. It was a crisis in the labor movement which excited intense indignation all over the country.

Q. And the mass meeting of July, 1914, in Union Square, took place after the massacre in Ludlow of the women and children? A. And was a direct result.

Q. Of the alleged massacre? A. Yes.

Q. To your knowledge it was a massacre?

Mr. Content: Objected to.

Q. Well, it is a matter of common knowledge? A. A matter of common knowledge, absolutely. Why, a monument has since been erected on that location.

Mr. Content: Objected to.

The Court: That is sustained.

Q. Mr. Abbott, do you know whether I was ever interested in educational matters? A. I know you have been interested in many educational matters.

Q. Do you know whether I ever had any connection with the Modern School of New York? A. I know you were one of the founders of the Modern School.

Q. I was one of the founders of the Modern School? A. Yes.

Q. What does that school stand for? A. Stands for the education of children along libertarian lines.

Q. Does that school stand for violence? A. It certainly does not stand for violence.

Q. Is that school fashioned after the ideals of Francisco Ferrer? A. It is.

Q. What was the attitude of Francisco Ferrer with regard to violence and education?

Mr. Content: I object to that; Francisco Ferrer is not on trial here.

Mr. Berkman: The point is this, that——

Mr. Content: Wait a moment.

Mr. Berkman: This has been borne out here; I was one of the original founders.

The Court: In view of the manner in which the point has been brought in I will allow the witness to state the principles of Ferrer briefly.

A. Well, Francisco Ferrer expressed himself definitely and specifically in regard to this question of

violence in a statement that has been circulated all over the world, and as far as I can remember the exact words they state, or rather Ferrer states, that what violence gains for us to-day another act of violence may lose for us to-morrow; only that which is laid deep in the consciousness and mind of humanity is permanent.

Q. Was that thought the foundation of the Ferrer School in this country? A. That statement appears upon the walls of the Ferrer School in this country.

Q. I mean the spirit and line of education as found here in the Ferrer School? A. Yes.

Q. Is it based upon that thought of Ferrer? A. Yes.

Q. And I was one of the original founders of that school? A. Yes.

By Juror Number Four.

Q. Do I understand that that is all based upon the laws of the United States, or within the laws of the United States? A. That it is within the laws.

Q. That in this school the pupils are taught to obey the laws of the United States and to be within the laws of the United States? A. The pupils of this school——

Mr. Berkman: Pardon me, that question is too general, it seems to me.

By Mr. Berkman.

Q. Did the Government of the City or of the Federal Government interfere with the Ferrer School?

Mr. Content: Wait a moment.

The Court: That is not the question. The question is perfectly intelligible, and Mr. Abbott is an intelligent man and can answer it.

A. The pupils of that school are certainly encouraged to use their faculty of criticism and idealism in regard to existing laws.

By Juror Number Four.

Q. But provided they are within the laws? A. They are not taught specifically to break the laws; they are encouraged to do their own thinking and their critical ideas and faculties to question and change unjust laws.

Q. Then they disregard the laws? A. There is certainly no such basis as that in the Ferrer School, they are taught to disregard the law, no.

By the Court.

Q. What he wants to know is this: Does the teaching at the Ferrer School in any manner involve disobedience of the law of this State and Government? A. No.

Q. And you say in that school they are taught to encourage criticism? A. We encourage criticism of all existing institutions in cases of what we conceive to be——

The Court: Very good; that is a privilege of every American citizen; but do you counsel in that school the breaking of the laws of the United States?

The Witness: No.

By Mr. Berkman.

Q. Can you give us a brief summary of the principles of the Ferrer School? A. The Ferrer Schools are based upon much the same principles that Ferrer taught in Spain in bringing up children to be self-reliant idealistic critics of the existing order, in the interest of a better and a more just social order—a freer, better and more just social order.

By the Court.

Q. When was that school founded? A. That school was founded after the execution of Francisco Ferrer in Spain seven years ago.

Q. He was executed about seven years ago? A. Yes.

Q. What was he executed for? A. He was executed on a charge of—let me see—the exact charge was that he was the fomenter and leader of a rebellion in Barcelona; that was the charge on which he was executed, but, according to my best knowledge and belief, on false testimony, as has been shown repeatedly in books that have been published since then by William Archer and other authors. We believe—a great many people believe—that he was executed on false testimony; and William Archer, the English translator of Ibsen, one of the leading English scholars and literary men, has published a book in which this matter is gone into in hundreds of pages, and in which all the documents in the case were offered and criticised and examined.

Q. Now, do I understand you correctly, the Ferrer School which you say Mr. Berkman founded, I think— A. (Interposing) He was one of the founders.

Q. (Continuing) Of which he was one of the founders, was established seven years ago? A. That is correct.

Q. That would make it around 1910, is that correct? A. That is correct; Ferrer was killed in 1909.

Q. And I see in this volume of July, 1914, a notation, I think, that you were at that time the head of the school? A. That is correct.

Q. It says, "The head of the Ferrer School"? A. That is correct.

Q. And I gather from that, and from what you stated to us, that you are thoroughly familiar with its principles? A. I am.

Q. Now, there was read yesterday—I think my attention was diverted—this article called "A gauge of change," is that correct?

Mr. Content: By Alexander Berkman.

The Court: Yes, page 167—was that read yesterday?

Mr. Content: Yes, I read that in its entirety.

The Court: Well, my attention was diverted and I was not quite sure.

Q. Now, in that article Mr. Berkman says, "Do you still ask me what the anarchists have accomplished in the last quarter of a century? Just this: They have taught the people that the violence is justified, aye, necessary in the defensive and offensive struggle of labor against capital." Now, is that in accordance with the Ferrer School? A. Well, that is a statement of an abstract principle; some believe under some conditions that violence is justifiable.

Q. You don't answer the question; I have read you a few simple English words. A. Well, my reply to your Honor is this: That there is nothing of that kind incorporated in the principles of the Ferrer School.

Q. Well, is that in accordance with the principles or contrary to the principles, or what, of the Ferrer School? A. I would say it was neither contrary nor in accordance with the principles of the Ferrer School. The Ferrer School has never declared itself on that particular point, as I recall.

Q. So that membership in the Ferrer School and the founding of the Ferrer School don't necessarily require a person to take the position either way, then, on that subject? A. No, no.

Q. And that is, the Ferrer School leaves each person free to do what he pleases? A. It leaves them free to form their own conclusions on this and other matters of that kind.

Q. And if a person advocated violence he would not necessarily be contrary to the principles of the Ferrer School? A. He would not be in accord nor necessarily contrary to the principles.

Q. Tell us what it is the pupils of the Ferrer School are taught—what is its principle? A. It is a school—an idealistic school—formed to promote higher social ideals—to encourage children to adopt higher social ideals.

Q. I know, but what does it mean? There are a great many standards that might be covered by the words "ideal"; that is largely the point of view of the persons who approve it. All these words you have spoken are words of broad and largely indefinable character. A. Well, we conceive this school is a school which is encouraging children to adopt social ideals that are superior to the present social ideals, and they are as clear as crystal.

Q. What are they? A. Ideals based upon the—

Q. I want you to give us something definite. A. Well, for instance, we stand in sympathy with the labor movement and its efforts to uproot the present capitalistic system and replace it by furnishing a co-operative system in which workingmen may control their own conditions, instead of being, as at the present time, exploited by the capitalists.

Q. Does that school—I am only inquiring because the other side opened it—Mr. Berkman, does that school advocate the abolition of government? A. It advocates the education of humanity to a place where they will be able to get along without government.

Q. Well, is it fair to say that it advocates the abolition of all government? A. In an ideal sense, yes.

Q. And that is what is being taught to the children that go to this school? A. The children will be encouraged to be self-reliant, so that in coming generations you may expect the people finally to get along without government.

Q. With a view that the ultimate ideal will be to wipe out all government? A. We do not teach dog-

matically any ideals in the school, but encourage the children to be critics of the existing system and to work for a system that will be freer, and finally realize a condition in which government would no longer exist, as we understand it to-day.

Q. Then, putting it briefly, the children are encouraged to form ideas looking toward the abolition of government? A. In an ideal sense, yes.

Q. And of course that includes the Government of the United States with all other governments? A. Of course.

By Mr. Berkman.

Q. Does the system of education in the Ferrer School try to develop in the children habits of self-government? A. Positively.

Q. And self-discipline? A. Positively.

Q. So that when you say in an ideal sense, you mean that the children are trained to be able to be their own rulers, so to speak, to be independent in spirit and independent in the sense in which Ralph Waldo Emerson enunciates the principle of self-reliance in his essay. And you would consider that the children trained in this manner would make the most ideal men and women? A. I think this training would tend to produce ideal human beings.

Q. Was the system of education in the Ferrer School as similar to or patterned on the free school of thought which Leo Tolstoi had in Russia? A. It was.

By the Court.

Q. Let me ask you so that we can get this point clear. On page 139 of the July, 1914, *Mother Earth*——

Mr. Content: Exhibit 55.

Q. (Continuing) Exhibit 55, under the heading "Alexander Berkman's opening address" occurs this

paragraph: "I want to go on record here to-day as saying that I prefer to believe that our comrades were not victims, in the sense of having been killed as the result of a conspiracy of the enemy. I want to go on record as saying that I hope our comrades had themselves prepared the bomb, intending to use it upon the enemy. Why do I say this? Because I believe and firmly believe that the oppression of labor in this country—the persecution of the radical elements especially—has reached a point where nothing but determined resistance will do any good. And I believe with all my heart in resistance to tyranny on every and all occasions." Is there anything in the Ferrer School, one way or the other, about preparing bombs to use on what the speaker here speaks of as the enemy? A. Positively not. But if I may call your attention to the quotation, those words are a direct quotation from Thomas Jefferson. Thomas Jefferson said, "Resistance to tyranny is obedience to God."

Q. You have no recollection that Thomas Jefferson talked about bombs, have you? A. No, I have not.

By Mr. Berkman.

Q. Is it not a fact that the very next sentence which the Court did not read explains the meaning of the preceding paragraph, and I will read it: "It was a great American who said that the tree of liberty must be watered now and then by the blood of tyrants"? A. That, I think, is also a statement of Thomas Jefferson's.

Q. That "Great American" has reference to Thomas Jefferson? A. That is correct.

Q. And when the word "Enemies" is referred to in this sentence, was that in connection with the struggle of labor and capital in Colorado? A. It was.

Q. Can that struggle logically be referred to as a war? A. A class war.

Q. Did not all the newspapers refer to the matter in Colorado as a war? A. They called it practically a civil war in Colorado at that time.

Q. And therefore this article refers to conditions of practical civil war in Colorado? A. Exactly so.

Q. Now, to go back to the system of tutoring in the Ferrer School; you are very familiar with the system of teaching that prevailed in Count Leo Tolstoi's school in Russia? A. I am.

Q. You are familiar with that school, that it is opposed to the tyranny of the Czar? A. Yes.

Q. And that it was forbidden by the Czar's government? A. Yes.

Q. Now, is it not a fact that the Ferrer School in New York was run along lines similar to Count Tolstoi's school in Russia? A. It was, and is based on Count Leo Tolstoi's school—libertarian principles of education.

By Miss Goldman.

Q. Since the Ferrer School has been taken up for discussion, I want to ask you whether or not you have any knowledge of the fact that Ferrer's innocence was proven in the Spanish Cabinet since his death?

Mr. Content: Now, I object to that; Ferrer is not on trial here.

By the Court.

Q. Of course, naturally, you were not in Spain at the time of his trial? A. No, sir, I was not.

Q. And I understood you to say before that your own personal view of the matter was that Ferrer was innocent of the crime for which he was executed? A. Exactly so.

By Miss Goldman.

Q. May we ask that Mr. Abbott explain to you? A. It is an important matter connected with court

procedure. After Ferrer was arrested and executed his property was confiscated by the government, his books—his school books and so on—were confiscated by the government. An appeal was thereupon taken by his lawyers to the government on the ground that he had been unjustly executed, and the charges against him were false, and the government recognized the truth of that statement to the extent that his property was returned to his heirs.

Q. I want to ask you, Mr. Abbott, since the question of the Modern School came up, and I am still connected with it—I don't want to have the jury misunderstand anything pertaining to it—now, Mr. Abbott, is it not a fact that the principle of the Ferrer School consists primarily in one thing—your Honor asked that, and it has not been answered—namely, to bring out all the latent qualities in the child? A. That is a correct definition.

Q. Is it not a fact that the Ferrer School, to give a definite definition, has to be differentiated from all other schools in this: That it only wants to bring out things and not knock in things? A. That is certainly correct.

Q. And is it not in that sense in harmony with all modern education the world over? A. I should say it was in harmony with the best educational thought of to-day.

Recross-examination by Mr. Content.

Q. Now, Mr. Abbott, you have spoken of the fact that practically a civil war existed in Colorado? A. Yes.

Q. That a state of belligerency existed was not recognized by the Government, was it? A. No, it was not recognized by the Government.

Q. And you also mentioned that in some of the speeches of Mr. Berkman at Union Square there were quotations from Thomas Jefferson? A. Yes, that is correct.

Q. It is your understanding, however, that Thomas Jefferson was largely responsible for the

form of government under which we live to-day? A. I understand that he is largely responsible for the form of government we have in this country at present.

Q. And he was an advocate of law and order and government? A. Why, he made a statement that the tree of liberty must be watered by the blood of tyrants and the blood of martyrs, I think he said.

Q. But you don't mean that Thomas Jefferson—you don't mean to indicate that Thomas Jefferson was a believer in no government? A. Jefferson himself was a believer in revolution, it seems to me.

Q. What is Miss Goldman's connection with the Ferrer School? A. She was one of the founders of the school.

Q. Somewhat similar to Mr. Berkman? A. Quite so.

Q. And her position in the school, was that somewhat similar to his? A. She was one of the founders of the Ferrer School.

Q. Well, answer my question. A. Her position and relation to the school was somewhat similar to Mr. Berkman's.

Q. And is it taught in the Ferrer School, if a particular law or statute is opposed to the ideas or beliefs of a great many members, are they at liberty to disregard that law? A. No such principle has been taught as that, to my knowledge, in the Ferrer School. I think a more definite statement of that would be entirely out of sympathy with the ideals of the Ferrer School.

Q. Do you mean that they teach the children to disregard the law? A. I mean our attitude toward the child would be for him to take his own position in regard to the laws.

Q. Then, according to the teachings a child might arrive, however, at a conclusion that a particular law being offensive to his ideals he could disregard it, although it was the law? A. If he was prepared

to take the consequences. That is up to the child, that he must be prepared to take the consequences of his actions.

Q. If they are prepared to take the consequences they are at liberty to feel that they may disregard the specific statutes of the United States? A. If they are prepared to act and take the consequences of their acts, if they are prepared to act according to their consciences and take the responsibilities for their acts, that would not be out of harmony with the teachings of the Ferrer School.

Q. Now, as a matter of fact, the actual charge on which Ferrer was convicted was technically high treason? A. He was convicted as the leader of a general strike in Barcelona.

Q. What was the technical charge? A. The charge against Ferrer was that he was the head and chief of a general strike that was called at Barcelona, Spain, as an anti-militaristic protest against war with Spain and Morocco in 1909—a general strike arising out of a militaristic protest of workingmen against war with Morocco in 1909.

By Mr. Content.

Q. Wasn't he indicted for treason? A. He was not indicted for treason; he was indicted as the head and chief of the general strike.

By Mr. Berkman.

Q. Is it not an historical act that the Supreme Court of Spain reversed the decision against Ferrer originally passed? A. Reversed the decision, and, as I have said, returned to him his property on the ground that this charge had not been proven.

Q. And is it not a fact that William Archer, the greatest critic and literary man of England, was sent by *McClure's* to Spain to investigate the whole situation, and that he declared the whole thing to have been a conspiracy to kill Ferrer? A. Two

articles on Ferrer, in *McClure's Magazine*, by William Archer, show that Ferrer was killed on false evidence.

ANNA BARON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. Have you known me for some time? A. I have.

Q. Have you worked in the office of *Mother Earth*? A. I have.

Q. Did you say in what capacity? A. Stenographer and secretary of *Mother Earth*.

Q. How long have you been employed in *Mother Earth*? A. About five years.

Q. During that length of time did you have an opportunity to copy my manuscript—different manuscripts? A. All the time—most of the time.

Q. Did you also, when I was on tour, receive many letters in my handwriting? A. Almost every day.

Q. Did you not or did you copy the manuscript for the book known as the Social Significance of the Modern Drama? A. I copied all of that manuscript.

Q. And when you received letters written while I was on tour, can you state how they were dated? A. Most of them, they were dated on the road—on the train.

Q. Written on the train? A. Written on the train.

Q. Now, having worked with me nearly five years, having received letters in pencil and written with pen, and also the manuscript you have copied, you are pretty familiar with my handwriting, are you not? A. I am.

Q. Will you please tell the Court whether you found it easy to read my handwriting? A. I always found great difficulty in reading your handwriting, and even after working five years I still find difficulty in reading your letters and manuscript.

Q. Then you can say that if a manuscript written in quiet and comfort is difficult to decipher, letters written on the train would not be very easy to decipher? A. Positively.

By Mr. Berkman.

Q. Those copies were sent to the printer, weren't they? A. They were. Miss Goldman's handwriting could never be made out by the printer, so everything had to be typewritten that Miss Goldman wrote.

Mr. Content: No questions.

Mr. Berkman: I would like to read in evidence here *The Blast*, Volume 1, No. 17, August 15, 1916.

Mr. Content: That is Defendants' Exhibit E.

Mr. Berkman: I shall read the most important excerpts, so as not to bore the jury; it is rather a lengthy article. The article is called "Down with the Anarchists" and appears in *The Blast* of last year at San Francisco (reading same).

In the same exhibit another article on "Violence and Anarchism" by Alexander Berkman, written a year ago, before we had any idea of this trial, and therefore not written for this purpose (reading same).

JACOB ABRAMS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. Mr. Abrams, what is your business? A. I am an organizer of the International Brotherhood of Bookbinders, Local Trade.

Q. Have you known me long? A. For the last year.

Q. Well, I don't know whether you knew I lived in California when I lived there? A. Yes, I knew when you came from California to the United Hebrew Trades.

Q. Where did you first meet me in New York? A. At the United Hebrew Trades, 175 East Broadway.

Q. At a meeting of that association? A. Yes.

Q. And that was the first time I ever met you? A. Yes, exactly.

Q. Now, on what subject did I speak? A. On labor unions in San Francisco.

Q. Did I speak of the labor unions in California, and especially San Francisco? A. Yes.

Q. Did I ask the United Hebrew Trades, as delegates of various labor organizations, to give us their co-operation? A. Yes.

Q. Did I talk to them about violence? A. Oh, no.

Q. Did I speak to them about the solidarity of labor and co-operation? A. Exactly.

Q. About the improving of labor conditions? A. Exactly.

Q. Did the United Hebrew Trades vote or pass some resolution after I spoke to them? A. Yes, they decided to authorize the members to call a conference of the different unions, to send their delegates, and raise enough publicity and money for the defense in San Francisco.

Q. Do you know whether that was a unanimous decision, that they decided to raise that support? A. It was a unanimous decision.

Q. Were you at the Harlem River Casino meeting of May 18? A. Yes.

Q. Were you anywhere near the platform? A. I was on the platform.

Q. Could you hear the speeches distinctly? A. Exactly.

Q. Where was I sitting on the platform before I spoke? A. You were sitting at the left side, fronting the public—at the left side.

Q. Do you know whether there were any people around me? A. Yes.

Q. Did you see a bugler come up to speak to me? A. No.

Q. No soldier? A. No, no soldiers were allowed on the stage. I was on the committee then.

Q. Was the stage door guarded against strangers entering? A. Exactly.

Q. Did you hear Miss Goldman speak on that occasion? A. Yes.

Q. Did Miss Goldman say, "We believe in violence and we will use violence"? A. Nothing of that kind.

Q. You are positive she did not say that? A. Absolutely.

Q. Did she say anything that could be construed as that? A. No, none.

Q. Did you hear Alexander Berkman? A. Yes, I did.

Q. Did you hear him say anything about violence? A. No.

Q. Did you hear any of the other speakers say anything about violence? A. Nothing of that sort.

Q. Did you hear Miss Goldman tell the people not to register? A. No, I did not hear about registration.

Q. Did you hear Alexander Berkman tell the people not to register? A. No, I did not hear that.

Q. Did you notice some commotion during that meeting? A. Yes.

Q. I want to ask you, do you remember whether there was quite a number of speakers scheduled to speak at that meeting? A. Yes.

Q. Did all of them speak? A. No.

Q. Why? A. On account of the disturbance of the soldiers; they kept up a disturbance, and Miss Emma Goldman appealed to the soldiers not to have a disturbance. Then I remember she told the soldiers that regular soldiers were expected to have intelligence enough not to have any disturbance.

Q. The meeting, to your knowledge, was closed before the regular time? A. Exactly.

Q. All the speeches were not put on? A. No.

Q. Did you hear Miss Goldman or myself—or rather did you hear Mr. Berkman address an appeal to the soldiers to please behave themselves? A. Yes, exactly.

Q. Were you in New York about four or five years ago? A. Yes.

Q. Do you remember whether in those years there was an organization here called the Anti-Militaristic League? A. Yes, I do, that was in the time of the Mexican affair.

Q. Do you remember who was secretary of that organization? A. I don't remember exactly the secretary.

Q. Do you remember whether that organization called a mass meeting at Union Square? A. Yes, that was in the summer time.

Q. In 1914? A. Yes, in the summer time.

Q. Do you remember whether I was a speaker? A. Yes, you were.

Q. One of the speakers? A. Yes.

Q. And that was in 1914? A. Yes.

Q. You heard me at that time agitate against war? A. Yes, I knew who you were from hearing you talking and mentioning your name, Alexander Berkman.

Q. Did you know that the principles of the Anti-Militaristic League in 1914 were opposed to war? A. Yes, it was opposed to war.

Q. Opposed to all war or some war? A. To all war.

Q. And you knew I was one of the speakers at that mass meeting in 1914? A. Yes.

Q. If you therefore should hear I was opposed to fighting you would not be very much surprised? A. Oh, no.

Q. Were you present at the conference meetings of the defendants and the No-Conscription League on May 23rd? A. Yes, I was there.

Q. Were you at Miss Goldman's apartments on that meeting? A. Yes, 139th Street.

Q. Do you know whether that was not originally called for the office? A. Of *Mother Earth*.

Q. Did you go to the *Mother Earth* office? A. Yes, I went.

Q. And were you asked to go somewhere else? A. Yes, it was telephoned you could not come there on account of your injury, and we should go over there, and so we went there.

Q. Do you remember whether it was mentioned that I called up? A. Yes, I was called downstairs and heard you call.

Q. The meeting was originally for the *Mother Earth* office? A. Yes.

Q. And word was sent it would have to take place at Miss Goldman's apartments because I could not walk? A. Exactly.

Q. Did you go to her apartment on that occasion —no, that was the first time—I mean did you go there? A. Yes.

Q. At the *Mother Earth* office you were informed to go to Miss Goldman's? A. Yes.

The Court: He said that two or three times.

Q. Was Mr. Berkman there? A. Yes.

Q. Miss Goldman? A. No.

Q. Was it explained why she was absent? A. Yes, that Miss Fitzgerald——

Q. Just yes or no. A. Miss Goldman was not there.

By the Court.

Q. Was Miss Goldman's absence explained? A. Yes, it was.

By Mr. Berkman.

Q. How was it explained? A. Miss Fitzgerald read a statement, or a letter.

Q. Was it stated where Miss Goldman was? A. Yes, it was.

Q. What was said about that? A. Yes, it was this way: she read a letter from Miss Goldman; Miss Goldman went away to Springfield—I think to some lecture, I don't know exactly—and then she received the letter that Miss Goldman regrets her absence, but she——

Q. Was the statement read from Miss Goldman? A. Yes, that was in the statement from Miss Goldman, from Springfield, Massachusetts.

Q. So far as you remember the gist of the statement, did Miss Goldman take the position——

The Court: No, don't lead. Just say, "State the substance of the statement."

Q. State the substance of the statement. A. The statement from Miss Emma Goldman said that she —in her letter that she regrets her absence, but that she knew this meeting is arranged for the purpose of calling a Mothers' Mass Meeting in Madison Square, and that in the meantime she directs, no matter who is chairman there, to talk about conscription, but the No-Conscription League shall not discuss anything on registration, and we shall not try to agitate for or against registration, and that

it will be absolute; but she expects of every member of the League that he shall act that way, as she believes in the absolute individual liberty, and we shall not urge anybody to do or not to do.

Q. Did you understand her statement to be an expression of her own position or— A. Of her own position.

Q. Was it decided— A. Was discussed by the members there.

Q. I mean so far as we all were concerned, did she take a decided position? A. She took a decided position.

Q. And when the letter was read, was there a discussion afterwards? A. Yes, there was discussion there.

Q. Now, at that meeting, after the statement was read and discussed, was an official vote taken? A. No.

Q. You have attended many labor meetings? A. Yes.

Q. You know no votes were taken, minutes like regular memoranda kept, when I presided? A. I did not follow that.

Q. At any time where I have been chairman would the proceedings be kept in this official manner? A. No, not at all.

Q. Would the question be put to a vote officially? A. No, never had been.

Q. It was instead an expression—it would be the consensus of opinion? A. Yes.

Q. When they considered a position? A. Yes.

Q. What was the final decision as to registration? A. The final decision, as far as I understood—well, there was about twenty-five people, and everybody expressed his opinion, you yours, and everybody, and they had this view that we should not urge people to register nor not to register, and in fact I am of conscriptable age and I registered.

Q. You are a member? A. I am a member of the No-Conscription League and I registered.

Cross-examination by Mr. Content.

Q. Were you in court yesterday? A. Yes.

Q. All day? A. Yes.

Q. Now, at this meeting of May 18th, at the Harlem River Casino, did Miss Goldman make any mention of registration in her speech? A. Not so far as I remember.

Q. Your best recollection is the word "register" or "registration" was not used? A. I don't remember it.

Q. That is your best recollection? A. I don't remember if she mentioned that word "register" or not to register.

Q. Well, that was an important point, wasn't it? A. Yes, but I don't remember exactly.

Q. But you do remember exactly—you do remember distinctly the exact words she used to the regular soldiers? A. Yes, because that attracted my mind, when they started a big disturbance.

Q. But you don't remember whether or not she mentioned the word "registration"? A. No.

The Court: The word "registration" or "register."

A. I really don't remember.

Q. In this letter that Miss Fitzgerald read, how many sheets of paper, do you recollect, was that? A. I think it was one sheet, and on the other side, or a sheet and a half; I don't remember exactly.

Q. Was it typewritten? A. I should say it was typewritten—I don't remember. I did not pay much attention, because it was announced anyhow.

Q. In this letter did she say to the No-Conscription League they should not discuss registration; was that the statement she said? A. No, they discussed, and had come to the decision——

Q. I asked whether in the statement of Miss Goldman she said registration should not be discussed?

A. The statement was we were not to advise people to register or not to register.

Q. Before you said Miss Goldman said she did not oppose registration? A. No, she said we should discuss the matter, but should not urge people to register or not to register.

Q. Either one way or the other, either register or not to? A. No, not to urge people not to, that is her position.

Q. Were you subpoenaed to appear in this case? A. Yes.

Q. Have you the subpoena with you—how was it served upon you? A. (Producing paper) Well, I heard about this case, and I went up to Mr. Weinberger, I went up, as being at the meetings and knowing.

Q. You did not tell anybody what you proposed to testify to? A. No.

Q. Did you discuss this with anyone? A. No.

Q. So that when you went on the stand this morning you didn't know whether you were to be asked about this speech of Miss Goldman which she gave at the meeting on May 18th? A. Not at all.

Q. You had no idea? A. None at all.

Q. So that your evidence now is that before you went on the stand you never told anybody about what you were going to testify to? A. Absolutely.

Q. I ask you, did you ever tell Mr. Berkman or Miss Goldman, the defendants, that you had not heard them in the May 18th speech say "we believe in violence and we will use violence"? A. I did not speak to them about it.

Q. Not at all? A. Not at all.

Q. You were a speaker at the meeting in Forward Hall? A. Yes.

Q. You spoke in the Yiddish language? A. I did.

Q. Were Miss Goldman and Alexander Berkman speakers at the same meeting? A. Yes.

Q. You were there and heard their speech? A. Yes, I did.

Q. At that time did you hear Miss Goldman use these words: "You say it is a law? I defy your law"? A. Well, I went out right after the speech—when Miss Goldman started to speak—on account of taking collections during the meeting, and I did not hear that.

The Court: Did you hear her speak?

The Witness: When she started I took the money to go to Forward Hall, to put the money in the safe.

Miss Goldman: We admit anything in the stenographic notes.

Q. Didn't you hear either Mr. Berkman or Miss Goldman speak? A. Yes, I heard Mr. Berkman.

Q. I put the question to you first as to Miss Goldman. A. Yes, I heard Miss Goldman, but not the whole speech. You did not ask if I heard the whole speech.

Q. Which part of her speech did you hear? A. When she started I went out with the money—I went to put the money away; I walked out, and the policeman would not allow me to come in.

Q. Did you hear any of Miss Goldman's speech? A. No.

Mr. Content: Will you allow me at this point—I would like to examine a witness on this. I would like to offer some testimony to show Miss Goldman at a previous meeting announced this meeting being held, and asked the people to come to it.

The Court: Yes, you have the right to lay your foundation.

Mr. Content: May I do that at this time?

The Court: Yes.

GEORGE D. BARNITZ, recalled.

Direct examination by Mr. Content.

Q. You have been called before in this case? A. I have.

Q. Were you present at the meeting held at the Royal Lyceum on West 114th Street on June 11, 1915? A. I was.

Q. Was Miss Goldman a speaker at that meeting? A. She was.

Q. Was I present at that meeting? A. You were.

Q. Do you recall at the close of her speech, when she announced or whether she announced a subsequent meeting? A. She did.

Q. What did Miss Goldman say at the close of her speech, in substance? A. She said there was another meeting at Forward Hall on the following Thursday, June 14, at 175—if I have the correct number—East Broadway, at 8 P. M., and she invited everybody to be present.

Q. Did she use these words, "On Thursday, June 14, there is going to be a meeting at Forward Hall, 175 East Broadway"? A. She did.

Mr. Berkman: The defense admits that anyway.

Q. Did she use these words, "We invite the soldiers, the police and all"? A. She did.

The Court: Do you want to cross-examine?

Miss Goldman: No, I have nothing to say.

Mr. Berkman: We admit all that.

Mr. Content: Now, I think I have laid the foundation. Miss Goldman invited people to this meeting, and that she was a speaker and Mr. Berkman was a speaker.

Mr. Berkman: That is admitted.

JACOB ABRAMS resumed the stand.

By Mr. Content.

Q. Was Mr. Berkman chairman of this meeting?

Mr. Berkman: Yes, sure.

A. He was.

The Court: The testimony is that the chairman of the meeting was the defendant Berkman, and that the defendant Emma Goldman announced the meeting, and under those circumstances the statements made by other speakers at the meeting are admissible. The weight and relation of the statements are matters for the jury to determine.

Q. Did you, in the course of your speech, in the Yiddish language, make the remark, "I will not allow myself to be conscripted under any circumstances"? A. I never said that.

Q. You never said anything like that? A. Absolutely; I did not speak about conscription.

Q. Never mentioned conscription? A. I did not speak about conscription or registration, not at all.

Q. You did not speak about that—what did you speak about? A. I spoke on the labor question.

Q. Only on the labor question? A. I spoke on the labor question only.

By Mr. Berkman.

Q. When you were invited by myself to speak at that meeting at Forward Hall do you remember whether or not I said to you I wanted you to represent the labor element? A. Exactly.

Q. Do you know whether I had another representative of the labor element there? A. Another? I don't remember.

Q. Whether one was invited—do you know Morris Cole was invited? A. Yes, of the amalgamated clothing workers.

Q. Do you know what is the full name? A. The Amalgamated Clothing Workers of New York, which consists of sixty thousand members.

Q. Is he the secretary and treasurer? A. He is the secretary for New York of the Amalgamated Clothiers.

Q. You and he were representing the labor element. Did you see on the platform, also, Mr. Vanstone? A. Mr. Vanstone of the United Hebrew Trades, yes.

Q. Who is he? A. He is the secretary of the United Hebrew Trades.

Q. The assistant secretary? A. Yes, assistant secretary.

Miss Goldman: Now, may I put in evidence (examining papers and submitting same to the Court)?

The Court: Just read it to the stenographer.

Miss Goldman: Yes, I will. Volume, Exhibit B, I want to read certain pages under the title "Anarchism"; I don't know the number of the page, I am sorry to say, pages 85, 86, 89, 92, 93, 113, and the beginning of the second paragraph on page 114. Then a part of the same Exhibit B, pages 169, 170 and 171, "The Modern Sequel of the San Francisco Fire."

Page 2, second and third paragraphs, pages 4, 5, 6 and 7, beginning with the first paragraph on page 8 and 9.

(Marked in evidence as Defendants' Exhibit H.)

The Court: Now, the next on your list here is *Mother Earth*, Volume 12, No. 1, page 34, an editorial.

(Marked in evidence as Defendants' Exhibit I.)

Miss Goldman: Also the same exhibit, Volume 12, No. 1, an article entitled "Promoters of War Mania," page 5 of Exhibit I.

Also Volume 10, No. 1, September, 1915, pages 248 and 249.

(Marked in evidence as Defendants' Exhibit J.)

Mother Earth, Volume 4, No. 5, page 137: "A New Declaration of Independence."

The Court: What year is that?

Miss Goldman: That is July, 1909.

The Court: What is that number?

(Marked in evidence as Defendants' Exhibit K.)

Miss Goldman: You have this exhibit in evidence, Volume 12, No. 2, *Mother Earth*, page 34.

The Court: Yes, I noticed that before, Volume 12 is marked at page 34 and is considered in evidence.

VICTORIA LEVENSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Miss Goldman.

Q. Miss Levenson, have you on a number of occasions done substitute work for me as a stenographer? A. Yes.

Q. You have typewritten some of my articles? A. Well, I remember one article I did, or two.

Q. You mean you copied one or two? A. Yes, copied.

Q. And also you have on different occasions taken dictation work on the machine, have you not? A. Yes.

Q. And also stenographically? A. Yes.

Q. But I mean copying articles, you have done so for me? A. Yes, once.

Q. How did you find my handwriting, easy? A. Oh, no, I could not; I would struggle very hard with it; you had to be at my hand, and then you would take it right over and read it, and then you would dictate it straight on the typewriter. Your actual writing—handwriting—I could not go along with it.

Q. Is it true, or is it not true, that you left out some words in the typewritten copy? A. Quite a good deal that I could not decipher and did not want to bother with.

The Court: Any questions?

Mr. Content: No.

Examination by Mr. Berkman.

Q. One question. Have you ever known Miss Goldman's manuscript written by hand to be sent to the printer? A. No, I don't remember that.

Q. Was it the custom of the office always to typewrite anything written by Miss Goldman? A. Yes, sir.

PAULINE TURKEL, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Berkman.

Q. What is your occupation? A. I am a stenographer and typewriter.

Q. Do you work for somebody now? A. I am.

Q. Did you at any time work in the *Mother Earth* office? A. I did.

Q. When was that? A. Between the months of January and May, 1917.

Q. Are you working in the *Mother Earth* office now? A. No.

Q. When did you leave the position? A. In the middle of May.

Q. What was the reason you left? A. I went to visit some friends in Albany.

Q. Albany, New York? A. Yes.

Q. While you were working in the *Mother Earth* office did you act as stenographer and typewriter for Miss Goldman? A. I did.

Q. Also bookkeeper? A. Yes, sir, bookkeeper.

Q. Did Miss Goldman write letters when she happened to be home in the office? A. She wrote a number of letters.

Q. Give you directions about the business? A. She did.

Q. Did you ever receive letters from Miss Goldman in her own handwriting? A. I did receive two while she was on the road.

Q. Did you find it easy to read her handwriting? A. Very difficult.

Q. Did you ever receive manuscripts from Miss Goldman for the printer? A. Yes, I did.

Q. Did you receive them in her own handwriting; when you did, did you send them to the printer? A. I did not, I typewrote them.

Q. Were there specific instructions in the office that anything Miss Goldman wrote should not be sent to the printer until it was typewritten? A. Well, we did not attempt that.

Q. What was the reason? A. Because it was so difficult to decipher her writing.

Q. Were you at the mass meeting at the Harlem River Casino on May 18? A. I was.

Q. Were you close enough to the speakers to hear them? A. I was.

Q. Hear them distinctly? A. Very.

Q. Did you hear Miss Goldman's? A. I did.

Q. Did you hear her whole speech? A. Yes, every word.

Q. Did she at any time say, "We believe in violence and we will use it"? A. I don't remember hearing any such remark.

Q. If she had used such an expression, would that have attracted your attention? A. I am sure it would.

Q. Did she tell people, advise or urge people not to register at that meeting? A. She did not.

Q. Did you hear Mr. Berkman tell or advise or urge any people not to register at that meeting? A. I heard nothing of the kind.

Q. You heard nothing like that, or in the other speeches? A. Not according to my memory.

Q. Did I speak about conscientious objectors? A. Yes, you did.

Q. Did I mention that it is up to the conscience and judgment of every person to do as he thinks best in the matter? A. You did.

Q. Were you present at the meeting of May 23rd, at Miss Goldman's apartment? A. I was not.

Cross-examination by Mr. Content.

Q. At the meeting of May 18th, do you remember what was said at that meeting? A. Certainly.

Q. What do you remember? A. Well, I remember Miss Goldman saying that the American people ought to be glad that at least they have a few people in Congress who are true to their conviction.

Q. Did she mention the names of any Congressmen? A. I remember only two, that was LaFollette and Stone.

Q. Was the word "registration" or "register" used at all according to your recollection? A. I am not positive.

Q. What is your recollection? A. Why, I think Miss Goldman said there would be a good many people who will not register.

Q. She did say that? A. Yes.

Q. Did you hear anything about supporting those who refused to be conscripted? A. I don't remember exactly.

Q. Well, that is rather important, isn't it? Wouldn't that impress itself upon your mind if she had said it? A. I think it would.

Q. Now, what is your best recollection as to whether or not she said, "We will support with all the means at our support, those who refuse to be conscripted"? A. I am not sure, and therefore I would not say she said it one way or the other.

Q. It would have impressed itself upon your mind if she had said it? A. I think it would.

Q. Was any pledge made by the people not to register that night? A. There was not.

By Mr. Berkman.

Q. Was there any collection taken at that meeting? A. Yes, there was.

Q. And do you remember who called for the collection? A. Miss Goldman.

Q. When she called for the collection, did she ask the people to donate as liberally as they could for the work of no-conscription? A. She did.

Q. What do you understand the word "pledge" to mean——

VICTORIA ŁEVENSON recalled.

Direct examination by Miss Goldman.

Q. Were you at the meeting which has taken place in my apartment on the 23rd of May? A. Yes, I was there.

Q. Was I present? A. No, you were not.

Q. Have you any idea why I was not present? A. Yes, you were away on a lecture, I think in Springfield, I don't know just where, I think it was Springfield.

Q. You think it was Springfield? A. I think so, I don't know just where, but I know you were away on a lecture.

Q. Did you hear my message read? A. Yes, there was a message by you.

Q. Which I sent? A. Yes.

Q. Did that message give the definite position, or statement, or rather the definite position of the writer, Miss Goldman? A. As regards what?

Q. Well, as regarding registration. A. No.

Q. I mean, did the message explain my position? A. Yes, in this way, I remember a few words, I will interpret it in my own way. You said, you told them in the message that it was a very serious matter, this registration, and that you could not take it upon yourself to tell them what to do, because it was against your conscience, that they were supposed to decide it for themselves.

JACOB J. LIND, a witness called on behalf of the defendants, affirmed on his oath, as follows:

Direct examination by Mr. Berkman.

Q. Where do you live? A. 178 Nostrand Avenue, Brooklyn.

Q. What is your profession? A. High School teacher.

Q. What school do you teach? A. Morris High School, Bronx.

Q. What subjects do you teach? A. I teach Latin.

Q. Are you a graduate of some university? A. Columbia College.

Q. Were you at the Harlem River Casino meeting on May 18, 1917? A. I was.

Q. Did you have any special purpose in going there? A. Sort of educational, I wanted to see the stand, hear the stand of the people who were opposed to conscription, because I always was opposed to conscription.

Q. Are you a conscientious objector? A. I am.

Q. Do you object to war for reasons of conscience? A. Absolutely.

Q. And you came to the Harlem Casino meeting to hear what steps would be taken with regard to registration and conscription? A. Well, I had my own stand, but I just wanted to see the stand of other people who had the same opinions, to get the general point of view.

Q. Did you hear Miss Goldman speak at that meeting? A. I did.

Q. Did you hear Mr. Berkman speak at that meeting? A. I did not.

Q. You did not hear me? A. I did not.

Q. You left before I spoke? A. I left just after the conclusion, after Miss Goldman's speech.

Q. Had you ever heard her speak before that? A. I never did.

Q. Have you known me a long time? A. Not at all—well, about a month.

Q. Just about a month you have known me? A. Yes.

Q. Have we had many conversations? A. None to speak of, worth speaking of.

Q. We hardly know each other? A. Quite right.

Q. Did you hear what Miss Goldman said distinctly? A. Quite distinctly.

Q. Were you close enough to the platform to hear everything? A. I think I was.

Q. Did you hear Miss Goldman say, "We believe in violence, and we will use violence"? A. I did not.

Q. You are positive? A. Quite.

Q. If you had heard that remark, or a similar remark, it would have been such as to call your attention to it strongly? A. I think it would, especially because I always felt the word "anarchist" was misunderstood by laymen; they always believe "anarchists" means lawless, whereas scientifically it means without law. There seems to be a slight distinction, but very pronounced.

Q. Did you hear Miss Goldman say anything which could be interpreted or that could have sounded like, "We believe in violence and we will use violence"? A. Absolutely not. The general impression I got was that she was against anything of that sort. That was just a general memory of whatever she said. I could not have construed anything whatsoever in the entire speech as favoring violence.

Q. And you, as a teacher, interested in educational matters, you are able to understand language? A. I think I am.

Q. And if she had said anything about violence, or something favoring it, you certainly would have understood it? A. Yes.

Q. Are you an anarchist? A. I am not.

Q. Are you in sympathy with the ideas of anarchism? A. Well, I think they are an ideal kind of philosophy that will bring the millenium if it came. Therefore I am in sympathy in that way; also I believe everybody ought to have a right to say what they think and we should always be open-minded because we can never tell what is the right and what is not the right. The only way to discover that is to listen to people think about it, and form your own judgment. We must be sympathetic with everybody and in that way I am sympathetic to anarchists.

Cross-examination by Mr. Content.

Q. Mr. Lind, at this meeting, did Miss Goldman say anything about conscription? A. I think she did.

Q. Was there anything of this sort said, "We will resist conscription by all the means in our power"? A. I think so.

Q. Did she say, "We will support with all the means at our support, with money and publicity, all those who refuse to be conscripted"? A. Well,

I remember the money and the publicity. I am not sure about the other words.

Q. You remember "money" and "publicity"? A. Yes.

Q. (Quoting) "We will support with money and publicity those who refuse to be conscripted"—she said that? A. I believe so.

Q. You say that you were a conscientious objector yourself? A. Quite right.

Q. Are you a member of any well recognized religious sect, opposed to war? A. I am not.

Q. You said to a certain extent you were in sympathy with anarchistic principles? A. I explained that by giving you my general stand. We should be open-minded to all new philosophies and new theories. In that sense I am in sympathy.

By the Court.

Q. Was anything said that night by Miss Goldman about registering, was the word registration used, or the word register? A. To my best recollection, yes.

Q. You think there was something said? A. Yes, I think so.

Q. Now, let me ask you something: Do you remember something of this sort was said—did you hear whether this was said, exactly, or in substance, "How many people are going to refuse to conscript, and I say there are enough"? A. I am not absolutely sure it was said that way, but I would go towards that direction and say I would favor myself believing it was said there.

Q. "I would count at least fifty thousand, and there are enough to be more"? A. I don't remember that.

Q. "And they are not going to when only they are conscripted"? A. I don't remember that.

Q. "They will not register"? A. I don't remember that.

Q. Do you say that was not said, or just that you don't remember? A. I don't remember.

Q. You don't say it was not said? A. I don't say it was not.

Q. "We are going to support, with all the means at our support, with money and publicity—we are going to support all the men who refuse to register, and who will refuse to fight"? What about that? A. The one I remember is aid with money and publicity. I am clear about that.

Q. You are clear that phrase was used? A. Yes.

Q. Was anything said about refusing or supporting the men who will refuse to register? A. I don't know whether a distinction was made there between refuse to register and refuse to be conscripted. The general idea I had, was that the conscientious objectors would be aided by this society publicly and with money for legal defense.

Q. For what? A. For being here as conscientious objectors.

Q. What I am asking you is do you remember, according to your recollection, that you heard that or not? You are sure that what I just read was not stated by Miss Goldman? A. I can't remember the exact words, but the purport of what I have given you, was given.

Q. Then do you say that the words, "The men who will refuse to register and who will refuse to fight," were not used? A. I don't remember that.

Q. Will you say they were not used? A. I say I don't remember that they were not used.

Q. You don't remember that they were not used? A. No, sir.

Q. So that you would not say that they were used? A. Yes, they might have been used.

Q. Did you hear the word registration? A. Yes, sir.

Q. About how many times, in the course of her speech? A. About two or three.

Q. About two or three times? A. Yes, sir.

Q. Have you any recollection of what was said about registration? A. The thing I carried away was this, that she said she would not advise people not to register, not because she was afraid, but because she believed it was a matter of personal conscience, and in such a matter each one should decide for himself.

Q. Did she say that about conscription? A. The general thing the speakers were discussing was registration.

Q. Is it your testimony that she affirmatively said that she would not advise people not to register? A. Absolutely.

Q. You are clear about that? A. Yes.

Q. Can you give me the words? A. I have given you the words, that she said she would not advise people not to register, not because she was afraid, but because she believed it was a matter of personal conscience, and in such a matter each one should decide for himself.

Q. She said in substance the words you have just stated? A. Yes, I think I am pretty accurate, the wording is pretty accurate.

Q. And it was this connection in which she used the word register? A. That is the connection in which I remember it most.

(Recess until 2 P. M.)

AFTERNOON SESSION.

2 o'clock P. M.

Mr. Berkman: I want to state to the Court, as to the statement as to which there was so much dispute, the statement of Miss Goldman, which was sent down from Springfield, that it has just been found among the effects of this defendant—and may we consult a moment?

The Court: Certainly.

Mr. Content: I am acquitted of the charge of larceny.

Mr. Berkman: May we now put this statement in evidence—may I read it?

The Court: Well, just let Miss Fitzgerald take the stand, and identify that as the statement.

MARY ELEANOR FITZGERALD recalled by the defendants.

Direct examination by Mr. Berkman.

that is the typewritten statement to which you referred? A. It is.

Q. And that is the copy that you made of the letter received by, or statement received by you from Miss Goldman from Springfield? A. Yes, that is the copy of the statement I made from her statement.

Mr. Berkman: The defense offers it in evidence.

The Court: It is received.

(Marked in evidence as Defendants' Exhibit L.)

By Mr. Content.

Q. That is the statement that you saw Mr. McGee take from the desk? A. That is the copy of the statement I mentioned yesterday.

Q. That is the copy of the statement that you read to the meeting? A. Yes.

The Court: Well, that is the other paper.

Q. That is the paper you read to the meeting (indicating)? A. Yes, that is the paper I read to the meeting.

Q. Did you only make one copy? A. I usually make carbon copies, but I (examining paper), I think this is a carbon of the original.

Q. I beg your pardon? A. I usually make carbons, carbon copies of those. I think this is the carbon.

Q. Well, I mean to say that if any statement was read at all at this meeting, it was precisely in these words? A. Yes.

Q. That was the only statement that was read? A. Yes, that was Miss Goldman's statement which was read there.

Q. Which you copied off, and which you read? A. Yes.

Q. And you read it just exactly as it appears there? A. Yes.

Q. Did you read it in its entirety—there seems to be some confusion as to whether you read it all—I mean to the assembled guests? A. As I remember, I read the whole thing.

Q. I rather imagine or thought some witness said that he thought that you only read part of it. A. (No answer.)

(Marked Government's Exhibit 60 for Identification.)

Mr. Berkman (reading): *Mother Earth*, Volume 9, No. 6, August, 1914, page 185, article by A. B. "Down with Militarism." I want to explain something here. The article is entitled, "Down with Militarism, Up with the Rights of Man." Now, I wrote, as editor of *Mother Earth*, I would sometimes sign as editor, sometimes my own name and sometimes a pen name. Now, my pen name usually had A. B., and this is by Charles A. Breckenridge. The middle initials also show the initials A. B. I am reading excerpts (reading same).

Miss Goldman: I want to read (reading). This is Exhibit B, page 85 (reading same).

Mr. Berkman: Exhibit No. 8, a few excerpts from an article of pamphlet that Miss Goldman published about a year ago, page 2 (reading same). That is a pamphlet on "Preparedness."

Defendants' Exhibit C. This is the last little excerpt I will read, and Miss Goldman wants to read one.

Volume 1, No. 2 of *The Blast*, published in San Francisco at that time, January 22nd, 1916. (Reading article on page 2, headed, "Aspirations of *The Blast*.")

Miss Goldman: I hope the jury will pardon Mr. Berkman and myself for reading so much, and tiring them out. I am going to read the new Declaration of Independence, which was written for the *Boston Globe* in July, 1909, by the defendant Emma Goldman (reading).

Mr. Berkman: The defendants rest.

Miss Goldman: The defense rests.

REBUTTAL.

Mr. Content: In rebuttal, I would first like to read the article from Defendants' Exhibit E, which is the August 15, 1915, copy of *The Blast*.

This is, "Worshipping the God of Dynamite." This is published in San Francisco (reading).

Mr. Content: I also want to read this which was read by Mr. Berkman (reading article in regard to bomb).

Now, I would like to read to the jury Defendant's Exhibit L. That is the statement that Miss Fitzgerald read at the meeting of May 23rd.

Mr. Berkman: I object.

The Court: One moment, Mr. Content. You have the right to read that.

Miss Goldman: Have I the right to read it?

Mr. Berkman: I have announced I was going to read it?

The Court: They evidently forgot to read it.

Mr. Berkman: Yes.

Mr. Content: All right. You can read it.

(Read to the jury by Mr. Berkman.)

Mr. Content: I would like to read a part of this over again. I think it is my right to do that, your Honor.

The Court: Yes, you have the right to do it.

(Read by Mr. Content.)

EDWARD J. CADDELL, a witness called in rebuttal on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are a patrolman of the New York City Police Department? A. I am.

Q. What is your shield number? A. 349.

Q. How long have you been a patrolman? A. It will be two years next month.

Q. Prior to going into the Police Department, what did you do, what was your occupation? A. Stenography, bookkeeping, various forms of clerical work.

Q. Are you a shorthand reporter? A. Yes.

Q. Prior to your entry into the Police Department, did you have experience in shorthand, and stenography? A. I did.

Q. Did you attend any institution where you learned stenography? A. I did.

Q. Which one? A. Commercial High School, Brooklyn.

Q. And in that institution you took a course in stenography and typewriting? A. I did.

Q. Did you attend a meeting of the No-Conscription League, held at the Harlem River Park and Casino, on the 18th day of May, 1917? A. I did.

Q. And by whose orders? At whose direction did you go to the meeting? A. Detective Barnitz.

Q. Who is sitting here at the table, and also testified as a witness in this proceeding? A. Yes.

Q. Were you present when Emma Goldman spoke? A. I was.

Q. Did you take a stenographic report of her speech? A. I did.

Q. Now, at the time you took this report, where were you with reference to the place where Miss Goldman was delivering her speech from? A. Well, about approximately, about fifty feet, seventy feet.

Q. Where? A. In the box.

Q. You mean on the main floor? A. On the main floor.

Q. Mr. Randolph testified he was in the balcony. You were not on the balcony? A. No, sir; I was not on the balcony.

Q. You were on the main floor? A. Yes.

Q. Seated or standing? A. Seated.

Q. Did you have your stenographic notebook? A. I did.

Q. Have you it in your pocket now? A. I have.

Q. Will you produce it (same produced). Did you have anything else to lean on? A. My knee.

Q. Could you hear Miss Goldman plainly from the place where you were seated? A. Very plainly.

Q. Did she speak slowly and deliberately? A. Slowly and deliberately.

Q. How many words approximately would you say her speech was? A. Well, I had no difficulty

in taking her and I would estimate she was never over 125 words a minute.

Q. Did you make a transcript of your stenographic notes? A. I did.

Q. When did you make that transcript? A. The following day.

Q. Did you see Randolph at the meeting? A. I did not.

Q. Did you know he was at the meeting? A. I did not.

Q. Did you ever compare your notes with Randolph? A. I did not.

Q. Did you ever have the transcript of his notes in your possession? A. No, sir.

Q. Were you called as a witness before the Grand Jury in this proceeding? A. I was.

Q. And was your transcript used before the Grand Jury? A. It was.

Q. Now, I show you a transcript, on which I have written the name "Caddell" in ink, and ask you to look and see if that is the transcript of your stenographic notes?

The Court: Your stenographic notes of Emma Goldman's speech on May 18th, 1917.

A. That is the transcript I made.

Q. Now, at the time you took the stenographic notes, did you take them to the best of your ability? A. I did.

Q. And as accurately as you could? A. I did.

Q. Was there much disturbance during her speech? A. Not that I noticed, nothing unusual.

Q. You had no difficulty in taking what she said? A. I had no difficulty.

Q. Now, in transcribing the stenographic notes into the transcript which I hold in my hand, did you transcribe your notes to the best of your ability? A. I did.

Q. And as accurately as possible? A. I did.

Q. And do you feel safe in saying that the paper I hold in my hand is an accurate transcript of your stenographic notes? A. It is.

Mr. Content: Now, I offer the original stenographic notes in evidence, and I offer the transcript in evidence.

The Court: Just pick out the———

Mr. Content: I will pick it out, but I think they better be marked, just for the purposes of the record. I will call his attention to specific passages.

The Court: All right.

(Marked as follows: The original notes were marked as Government's Exhibit No. 61.

The transcript of the original notes was marked Government's Exhibit 62.)

Q. Now, taking Exhibit 61 in your hand, will you see if you can find on these these words, "We believe in violence, and we will use violence." Have you found it? A. Yes.

Q. Now, will you place a mark there (witness marks on book).

Mr. Content: Now, will you please step down from the stand, and show that to the official stenographer of the Court, Mr. Hawthorne.

(Shown to the official stenographer. Same also shown to Mr. Munter, the stenographer for the defendants, who was in court.)

Mr. Munter: It confirms his transcript, that phrase, if that is of any importance.

The Court: You mean the stenographic notes of that phrase.

Mr. Content: You have the transcript?

Mr. Munter: I have. What Mr. Content read is a correct transcript.

Mr. Content: Now, step right over so that we can all see.

The Court: Now, you have marked that with a sort of a cross, with three intersecting lines.

Mr. Content: Suppose you put an "A" next to that, because we may have occasion to call attention to other passages.

Q. Now, Mr. Caddell, will you see if the following paragraph occurring in the transcript you find in your stenographic notes, where she says, "How many people are going to refuse to conscript, and I say there are enough. I could count fifty thousand, and there are enough to be more, and they are not going to, only when they are conscripted. They will not register." Do you find that? A. I have found that, yes.

Q. Will you place a mark "B" next to that?

The Court: Show that also to the official stenographer and to Mr. Munter.

(Same shown to the official stenographer and to Mr. Munter.)

Mr. Hawthorne (the official stenographer): That is apparently correct.

Q. In other words, did I read that transcript correctly, of the stenographic notes, in the passage indicated by this mark "B"?

Mr. Munter: Yes.

Mr. Hawthorne: Yes.

Q. Now, reading in the same paragraph, Mr. Caddell—(At this point the official stenographer, Robert W. Hawthorne, and the stenographer for the defendants, Paul Munter, were duly sworn).

The Court: Has the testimony which you have given heretofore in the shape of checking up on the stenographic notes of Mr. Randolph been true?

Mr. Hawthorne: Yes.

The Court: And the same question with reference to what you have just done in regard to Mr. Caddell?

Mr. Hawthorne: That is true also.

Q. Now, reading in the same paragraph, skipping the next sentence, there appears this: "It will not be such an easy job, and it will compel the Government to sit up and take notice, and therefore we are going to support with all the means at our support, with money and publicity we are going to support all the men who will refuse to register, and who will refuse to fight"? Have you found that passage, Mr. Caddell? A. Yes, I just read it to you.

Q. Now, will you place the mark "C" next to that? A. Yes.

Mr. Content: Is that correct, Mr. Munter?

Mr. Munter: Yes.

Mr. Content: Is that correct, Mr. Hawthorne?

Mr. Hawthorne: Yes.

Q. Did you look at the last passage marked "C," which I read? A. Yes.

Q. Did it conform to your reading of the stenographic notes, did your stenographic notes conform with the transcript of that statement, as I read it? A. Yes.

Q. Now, Mr. Caddell, will you take your notes and a little further on, a couple of paragraphs further, I read this: "We will have a demonstration of all the people who will not be conscripted, and who will not register"?

The Court: Mark that "D."

Q. Did you find that in your notes? A. I have just read that over with you.

Q. But have you read it as I have read it? A. Yes, you read it accurately.

(Same examined by Mr. Munter and Mr. Hawthorne.)

Mr. Hawthorne: Yes, I do.

Q. Now, in the same paragraph, skipping a sentence, do you find this: "I will say in conclusion that I for one am ready to take the consequences of every word I said, and am going to say on the stand I am taking. I am not afraid of prison." Do you find that, Mr. Caddell? A. Yes, I do.

The Court: Will you mark that "E."

The Witness: Yes.

Mr. Content: Have you looked at that, Mr. Munter?

Mr. Munter: Yes.

Mr. Content: Have I read it accurately, according to your reading of the stenographic notes?

Mr. Munter: Yes, you have.

Mr. Content: And you, Mr. Hawthorne, do you confirm Mr. Munter's statement?

Mr. Hawthorne: Yes.

Q. Now, I want you to look at the part of your notes where Miss Goldman in her speech refers to certain men in Congress or the Senate, "Friends, in Congress there are a few men in the Senate, Stone, LaFollette, etc.," do you find that in your minutes? A. I do.

Q. Have you the name of Stone and LaFollette in the minutes? A. I have.

The Court: Mark that "F."

Q. Were there any other names than those in Miss Goldman's speech? A. That is all I noted.

Q. Do you think she mentioned some you did not know? A. I usually write proper names in longhand, which would take longer.

Q. It is customary in stenography to write proper names in longhand? A. It is if you have time.

(Book shown to the Court.)

Mr. Content: Will you note on the record the Court saw the names written in longhand.

The Court: Well, show it to the jury.

Mr. Content: Oh, yes; show it to the jury; excuse me.

Q. Now, there was also a Russian name, Mr. Caddell——

Mr. Content: Show that to Mr. Hawthorne, to make the record complete, the names of Stone and LaFollette.

(Same shown to the official stenographer and to Mr. Munter.)

Mr. Content: Mr. Hawthorne, do you find these words, "Friends, in Congress there are a few men in the Senate, Stone, LaFollette, etc., who wanted to keep America out of war"?

Mr. Hawthorne: Yes.

Mr. Munter: I also find them.

Q. Toward the end of the speech, a little further along than anything I have read, do you find these words, "You cannot stop the revolutionary spirit." Have you got them? A. I have it.

Q. (Reading) "You cannot stop the revolutionary spirit. It may take as long as one-year or two, you can't do it, because the spirit of revolution has a marvelous power of liberty. It can break through bars, it can go through safely. It can come out stronger and braver. If there is any man in this hall that despairs, let's look across at Russia, let's

look across at Breshnavosky, who was tortured by the Russian soldiers." Have you that same spelling in your notes, B-r-e-s-h-n-a-v-o-s-k-y? A. I have that spelling.

Q. Will you please show that to Mr. Munter? A. Yes.

Mr. Munter: Yes, I have seen it.

The Court: Make that mark "G."

Mr. Content: Show it to Mr. Hawthorne. You have seen that same statement there, Mr. Munter?

Mr. Munter: Yes.

Mr. Content: And Mr. Hawthorne, you have seen that same statement there?

Mr. Hawthorne: Yes.

Q. Was that the best you could get out of it? A. I did not make any inquiries, I wrote it as it sounded.

Q. And that is the best you could do with it? A. Yes.

Q. You don't spell Russian? A. No, sir; not very well.

Q. Have you any familiarity with Russian names? A. No.

Q. Now, I will not call your attention to any other passages, but I think you testified that you made this transcript here, that is, Government's Exhibit No. 62, the next day after the meeting? A. Yes.

Q. And you never compared it with Mr. Randolph's transcript? A. I did not.

Q. You never compared your notes with his notes? A. No.

Q. Your work was independent? A. My work was independent of his.

Q. And you took down what you got to the best of your ability? A. Yes.

By the Court.

Q. I understood you to say you did not know Officer Randolph was in the hall? A. No, I did not know he was in the hall.

Q. What is your position, I have missed that? A. Detective in the Police Department, assigned as stenographer.

Q. And like Mr. Randolph, you were assigned to duty by your superior officers? A. Yes, that is correct.

Q. And I assume, on account of your knowledge of stenography, you attend mass meetings, do you? A. I do, when I am ordered.

Q. When you are ordered, I mean. A. Yes.

Q. And you take stenographic notes of such meetings as you are sent to for that purpose? A. Yes.

Q. And were you used before by the Department for that purpose? A. Now, I have been used frequently. That is, when a large meeting has occurred, since conditions have started to exist, which did not exist before.

By Mr. Content.

Q. Have you taken any other speeches of Miss Goldman's since the No-Conscription League was started? A. I did.

Q. Where? A. At Hunt's Point Palace.

Q. June 11? A. June 11.

Q. What other, Forward Hall? A. Yes.

Q. June 14? A. Yes.

Q. Did you take Mr. Berkman's speech that night, too? A. I did.

Q. Have you an independent recollection of that speech, the one in Forward Hall? A. Both, yes.

Q. Do you recall whether Miss Goldman used this phrase, "I defy your law"? A. I distinctly recall it.

Q. You recall that without reference to your notes? A. I do, yes.

Q. Do you know whether Miss Goldman used this phrase, "Not in the wretched little court which is called your law of the United States"? A. I heard her say that.

Q. Without consulting your notes? A. Yes.

Q. Have you your notes of the Forward Hall meeting with you? A. I believe I have.

Q. See if you can find that phrase. Now, in that same paragraph, in the middle of the paragraph, which I marked—suppose you mark that "X," in that book. You find this, "You will say that it is a law. I defy your law." Do you find that? A. Yes.

Q. (Reading) "You say it is a law. I defy your law." Have you got that? A. Yes.

Q. Now, at the end of that same paragraph, you find these words: "Not in the wretched little court which is called your law of the United States"? A. Yes.

The Court: What do you say, Mr. Munter?

Mr. Munter: Yes, the transcript is correct.

The Court: As to both?

Mr. Munter: Yes.

The Court: Show it to Mr. Hawthorne, to get the record straight.

Mr. Content: This really does not matter.

The Court: All right.

Mr. Content: It just goes to the credibility of the witness. This is a fact which was confessed by Miss Goldman. This is a speech of June, 1914.

The Court: Oh, yes.

Mr. Content: You will recall the testimony of Mr. Barnitz, that Miss Goldman introduced, announced this in a previous meeting.

The Court: Yes.

Q. Do you find towards the end of Miss Goldman's speech, about a page before the end, "The moment you enter into court you are like the Dante looking down into the Inferno; 'You who enter here, leave all hope behind'; that is again the American court"? A. Yes.

Q. Did you look at that, is that correct? A. Yes, I have been reading the same.

Q. "That is again the American court"? A. Yes.

Q. Is that what you have, "That is again the American court"? A. Yes, that is correct.

Mr. Munter: That is correct.

Mr. Content: Mark that with a "Y."

That is all.

Q. What is the average of the different speeches at which you have taken Miss Goldman since the campaign started, what would you say was the average words a minute, according to your opinion? A. The average has been very fair for me to take, so it never was more, I do not think, than 125 or 130 words a minute, I never had any difficulty in taking her.

Q. No difficulty? A. No difficulty.

Miss Goldman: I just wish to ask the Court for instructions, since this was given in as evidence, the Hunt's Point Palace notes, and the Forward Hall, because I would like to know would we be permitted to use part of that in our summing up, part of the notes of the stenographer.

Mr. Content: If Miss Goldman wants all this offered in evidence, I will be glad to offer it.

Miss Goldman: I would like to have it in evidence.

Mr. Content: This is the Forward Hall. The Hunt's Point is already in evidence. Mr. Pickler took that, your own stenographer.

The Court: The Hunt's Point is entirely in evidence.

Miss Goldman: It is.

Mr. Content: And it is uncontradicted so far.

The Court: Those are Mr. Pickler's notes, I understand.

Miss Goldman: Yes.

The Court: Now, the Forward Hall is only in evidence to the extent that Mr. Content has offered it, but if you desire the whole thing can go in evidence.

Miss Goldman: What I meant to ask is whether the notes of Mr. Pickler, who was our engaged stenographer, I would like to know whether we can bring that in evidence.

The Court: As to Forward Hall?

Mr. Content: He was not called, he was not interrogated as to Forward Hall.

The Court: Well, I will let you call him for that purpose.

Mr. Content: Is there any dispute about Forward Hall?

Miss Goldman: There certainly is.

Mr. Content: I did not understand it that way.

The Court: Why, certainly you may call him.

Mr. Content: May I settle it this way: There is no dispute about Mr. Pickler's notes as to the Hunt's Point Palace.

Miss Goldman: None whatsoever.

Mr. Content: They are before the Court, and all of that is in evidence, as that transcript is in evidence.

Miss Goldman: Certainly.

Mr. Content: Now, these transcripts of Randolph and Caddell, as to the May 18th meeting, any dispute that you had no stenographer there?

Miss Goldman: No.

Mr. Content: So that you are bound by that testimony?

Miss Goldman: Unfortunately, yes.

Mr. Content: So that the only other meeting I quoted from is the meeting at Hunt's Point?

The Court: No, Forward Hall.

Mr. Content: Yes, Forward Hall, excuse me. I have not offered it all in evidence, but I will be very glad to.

Miss Goldman: Well, I just wish——

The Court: This is on your own rebuttal. You have a right to call Mr. Pickler in regard to the Forward Hall minutes. If there is any point, you can withdraw Mr. Caddell, while you have the right to call him.

Miss Goldman: May Mr. Munter look at the shorthand notes of Mr. Caddell?

The Court: Yes.

Mr. Content: Yes, I will call another witness in the meantime.

By Mr. Berkman.

Q. You are a policeman and detective? A. From the Civil Service, appointed as policeman.

Q. Are you a member of the Police Department? A. I am.

By Mr. Content.

Q. What were you going to say? A. Simply that the Civil Service appointed me to the Police Department.

Q. And you have been assigned to the Detective Bureau? A. Yes, if you look up the Detective Bureau, you can find it.

Q. In other words, your Civil Service rating is patrolman? A. Yes.

Q. And that is your rank? A. Yes.

Q. And the fact that you are a detective is simply the particualr service that you are assigned to? A. Yes.

WILLIAM J. FINERTY, a witness called in rebuttal on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. You are the official stenographer of the United States District Court for the Southern District of New York? A. Yes.

Q. And do you hold the contract with the Department of Justice for all the stenographic work in the criminal branch of the District Court of the United States for the Southern District of New York? A. Yes.

Q. How long have you been a shorthand reporter? A. Twenty years.

Q. Did you attend a meeting held in the Hunt's Point Palace, in the Borough of the Bronx, New York City, on June 4, 1917? A. Yes.

Q. Did you take that evening the speech of Miss Emma Goldman? A. Yes.

Q. Are you able to state what your opinion is as to the average of words a minute of the speech of Miss Goldman in the course of her address on that evening? A. Yes.

Q. What would be your opinion as to her average? A. Approximately 125 words a minute.

Q. Now, sometimes she goes a little more quickly, sometimes a little more slowly? A. Yes.

Q. But you think that is a fair average? A. Yes.

Q. Is it an easy matter to take Miss Goldman's speeches or is it difficult? A. Oh, it is neither difficult nor easy.

Q. Well, I mean is she a clear speaker? A. Good clear voice; I had no difficulty.

Q. Did she enunciate distinctly? A. Yes.

Q. Is that the only occasion on which you took her speech? A. Yes.

The Court: Any questions?

Mr. Berkman: No.

The Court: Is Mr. Randolph here?

(Mr. Randolph came forward.)

The Court: Mr. Randolph, have you your notebook with you?

Mr. Content: It has been marked for identification already, hasn't it?

Mr. Randolph: Yes.

The Court: That is all I wanted to know. I only wanted to know whether the notebook was here.

Mr. Content: I offer Exhibit 30 for Identification in evidence.

The Court: Yes, I think it should be.

(Marked in evidence as Government's Exhibit 30.)

Mr. Content: You will recall Mr. Randolph wrote on a separate sheet certain symbols in stenography.

The Court: Yes. I want that book to go to the jury, to see whether the signs compare with each other.

Mr. Content: Well, there are some slight differences. Sometimes they make an "N" hook instead of an "N" stroke.

Miss Goldman wants this whole paragraph read, so I will read it, instead of the part I read before (indicating).

(Same read by Mr. Content.)

ROBERT W. HAWTHORNE, a witness in behalf of the Government, having been previously duly sworn, testified as follows:

Direct examination by Mr. Content.

Q. Although two persons may use the Pitman system of stenography, is there some difference in making the symbols? A. Yes, according to the individual.

Q. Will you just explain to the jury what that difference is? A. I would like to point it out in the two notebooks of Mr. Randolph and Mr. Caddell.

Q. Mr. Hawthorne, will you explain to the jury the difference in the ending of the symbol "N" in stenography? A. Well, the difference——

Q. Speak a little louder, please. A. The difference is illustrated in the stenographic notes of Mr. Randolph and Mr. Caddell, perhaps better than I can explain it. In one case, in the case of Mr. Randolph's notes, he uses the "N" stroke in writing the word "violence," and in the case of Mr. Caddell's notes, he uses what we call the "N" hook. That is the only difference in the two words. It can be written though, either way, depending entirely on the stenographer. Some men prefer to make the stroke, and some men prefer to make the short hook.

The Court: That is quite a usual difference among stenographers, depending upon the individual?

The Witness: Absolutely.

Q. And that would be the same thing in the Isaac Pitman system? A. Yes, sir.

Q. Mr. Caddell and Mr. Randolph use the same system? A. The same basic system.

Q. And would your explanation be, for example, that some men would connect the word with a

downward stroke? A. In other words, shorthand writers show their individuality just as longhand writers do.

Q. But you have no difficulty, or had no difficulty at the time of these different phrases, when Mr. Caddell's stenographic notes were called to your attention, in reading his notes as I read them from the transcript? A. Not at all.

The Court: Any questions?

Mr. Berkman: No.

Mr. Content: If your Honor please, the Government rests.

Mr. Berkman: The defendants rested long ago.

The Court: Do you desire to make a motion to dismiss, in order to safeguard your case?

Mr. Berkman: Certainly, I make a motion to dismiss the case, as the Government has not brought the least evidence to prove the charge that the defendants advised and urged people not to register. All the testimony in the case proves that the defendants spoke mostly about conscription, and that there was a special statement by Miss Emma Goldman, sent from Springfield, telling the people implicitly that she will not advise them not to register, that she would give them no definite advice on that matter, and that she leaves it to each one to use his own judgment in this matter; and for that reason I claim, or the defense claims, the Government, instead of proving beyond a reasonable doubt the guilt of the defendants, did not make out any case at all against them; that the charge of conspiring the Government don't even begin to prove; no conspiracy has been proven; it has not been proven that either of the defendants advised anyone not to register;

as a matter of fact it has been proven that one defendant or both defendants did advise people to act according to their own conscience and refused to advise them not to register; and on all these grounds and many others which probably it is not necessary to mention just now, we ask that the case be dismissed in the interests of justice.

The Court: May the record show that the motion is made to dismiss the indictment on the ground that the indictment does not set forth a crime; secondly, on the ground that the Government has failed to sustain the allegations of the indictment against the defendants; and you may also note that the defendants move to dismiss the indictment on the further ground that the act in question, which is claimed to have been violated, is unconstitutional. The Court denied the motion, and an exception is reserved to each defendant.

Mr. Berkman: Exception.

Mr. Content: You mean the exception to have been made on behalf of both defendants.

The Court: Both defendants.

Miss Goldman: Yes. May I get on the record just now, I was not prepared to state my basis for dismissal, and I want to know if I would have to do it now?

The Court: If you desire to make a more formal motion on Monday, you may do so, prior to the summing up.

Miss Goldman: All right.

The Court: I only wanted to be sure I would not forget to note the motion on your behalf.

(Whereupon the trial was adjourned to Monday, July 9, 1917, at 10 o'clock A. M.)

New York, Monday, July 9th, 1917.

Trial resumed pursuant to adjournment.

Present:

The Court, counsel and jury as before.

(Mr. Berkman summed up to the jury on behalf of the defendants.)

(Miss Goldman summed up to the jury on behalf of the defendants.)

(Mr. Content summed up to the jury on behalf of the Government.)

The Court's Charge.

MAYER, *J.*:

Gentlemen of the Jury: It is with real sincerity that I express to you my appreciation of the patience that you have displayed throughout this trial, and of the very close and intelligent attention which you have given to the testimony as it was adduced, and to the summing up of the defendants, and of the counsel for the Government.

It is extremely important to concentrate your minds upon the particular question here involved, arising out of the indictment of these two defendants. They are charged by the Grand Jury with an offense which I shall more technically define later, which in effect is this, that they have knowingly and wilfully counselled, abetted and aided persons of the so-called draft age, to violate a statute of the United States, against the peace and dignity of the United States.

Many things, as happens in almost every case, have crept into the case which have a collateral rather than a direct aspect. It was suggested by one of the defendants in his summing up that there

had been brought into the case references to anarchism and the Ferrer school and violence, by virtue of the action of the prosecuting attorney. The fact is, as you all know, that those who first mentioned anarchy and anarchism were the defendants themselves; that the reference to the doctrines of Ferrer were elicted by questions put by them, and that these matters came into the case in great measure because of a question of credibility, to which I shall later with some particularity refer.

This is not a trial of political principles. This cannot be turned into a political or State trial in the political sense. You are not to be misled by any effort to digress your minds from the real issue, which simply is, whether these defendants are guilty or not guilty of the crime charged in the indictment.

This is not a question of free speech. Free speech is guaranteed to us under the Constitution. No American worthy of the name believes in anything else than free speech; but free speech means, not license, not counseling disobedience of the law. Free speech means that frank, free, full and orderly expression which every man or woman in the land, citizen or alien, may engage in, in lawful and orderly fashion; and that free speech is guaranteed to us, and no court would deny it to anyone.

Prior to the enactment of the so-called Selective Service Law, aptly designated such by the President, on the 18th day of May, 1917, any person could discuss in the fullest manner possible the provisions of pending legislation, and any person in discussing that legislation could use even the most vehement language and present any and all arguments that seemed to him or to her best; but when that discussion became embodied into law, then it became the duty of every person living under this Government to obey that law. Individual opinion might still be fully expressed, and proper

agitation for the repeal of such a law continue; but the law itself thenceforth must be obeyed.

This is a republic founded upon principles of democracy. It can remain a republic only so long as the law is obeyed. Obedience to the law is the fundamental basis of American life. Once that basis disappears or is destroyed, the whole fabric is destroyed, and the foundation upon which a Government of free men rests, disappears.

What was the method which the framers of the Constitution devised with an extraordinary and prophetic foresight? They had just won their freedom after long years of struggle, and they realized that the republic which they were founding must rest upon law, that that law must be the expression of the will of the people, through duly organized methods, and through orderly channels. They devised a system which has stood the test now of well beyond a century. It was a system that was to record not merely the passing will of the majority, but it was a system that would be fair to the minority; and therefore, with the greatest measure of care, they devised what the political philosophers have called a system of checks and balances, by which they made the three great departments of government independent of each other. A Law cannot become a law by the mere passage of the Act of Congress. Before it becomes a law it must have the approval of the second branch of the government, the Executive. And even then, if the Constitution has been violated, or has not been accorded with, any person in the land has the opportunity, in lawful fashion, of attacking that law; and the Courts have the power to declare it unconstitutional. And the courts have so declared on many occasions, fearlessly and courageously, laws enacted in the passing passion of the day, to be unconstitutional.

So that you see we have a very elaborate and a very careful system by which before any thought

becomes concreted into law, that law is subjected to discussion in and outside the halls of Congress, and must then have the approval of the Executive, and must then stand the test of an appropriate court inquiry.

With such an elaborate system in the minds and known to Congress, Congress enacted this Section 37 of the United States Criminal Code, phrased in very simple language, that any man may understand, that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to that conspiracy shall be fined not more than Ten Thousand Dollars ($10,000) or imprisoned not more than two years, or both.

On the 18th day of May, 1917, this so-called Selective Service Act became a law. That act provided for a general and comprehensive scheme for calling upon men between twenty-one and thirty years of age, to serve wherever the Government might assign them, whether in the Army or in the Navy, or in industrial or in agricultural pursuits. It was passed, as you know, after elaborate discussion, and when passed, under our system of representative government, it represented the will of the people under our system, and became the law.

Now, as a necessary part of that whole scheme of law, and as a section of that statute, not a separate statute, but a part of the whole scheme, Congress of course saw the need of having a register of those who became or would be within those ages that I have referred to. It was necessary to find out the name and address of every person throughout the country between the ages of twenty-one and thirty, so that later, by a further proclamation of the President, a further carrying out of the statute, the Government could determine whom

to call upon, and in what capacity; and, as you know, elaborate provisions are to be found in that statute in respect of the exemptions; and all these steps were to the end, from the point of view of Congress, of enacting a statute that would be as equal and as fair as human statutes can be in the carrying out of this important measure which received paramount attention from Congress and the President.

Now, what does that Section 5 say? That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with the regulations to be prescribed by the President, and upon the proclamation of the President, or other public notice given by him or by his direction, stating the time and place of such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men in the regular army, the navy and the National Guard, and the naval militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act, and that every such person shall be deemed to have notice of the requirements of this act, upon the publication of such a proclamation, or other notice as aforesaid, given by the President, or by his direction; and any person who shall wilfully fail or refuse to present himself for registration, or to submit thereto, as herein provided, shall be guilty of a misdemeanor, and on conviction shall be punished as the statute provides.

Now, there is another provision of the United States Statutes, known as Section 332, of the United States Criminal Code, which also is simply worded and easy to understand: "Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces or procures its commission, is a principal."

Now, having in mind these three statutes, let us look at the indictment, eliminating from it as much of the purely legal language as is possible: The Grand Jurors of the United States of America, within and for the District aforesaid, on their oaths present, that on the 18th day of May, 1917, the President of the United States of America duly issued his proclamation, as provided by the Act of Congress, approved May 18th, 1917, to the effect that the time and place of such registration should be between 7 A. M. and 9 P. M. on the 5th day of June, 1917, at the registration place in the precinct wherein those people that register may have their permanent homes; that those who shall have attained their twenty-first birthday, and who shall not have attained their thirty-first birthday on or before the day therein named, are required to register.

So, therefore, on the 18th day of May, by virtue of that Act, it became the duty of every person, citizen or alien, every male person in the United States, to register as the President's proclamation indicated, on the 5th day of June, every person who was between these ages of twenty-one and thirty.

And then the indictment continues: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that Emma Goldman and Alexander Berkman on the 18th day of May, 1917, and on each and every day thereafter, up to and including the date of the filing of this indictment, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly, and feloniously did conspire together and agree between themselves and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, that is to say, said defendants unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves and with the said divers persons whose names are to the Grand

Jurors unknown, that divers persons whose names were to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration, should knowingly and wilfully fail to register, and fail and refuse to present themselves for registration, and submit thereto, as provided by the aforementioned Act of Congress of May 18, 1917. And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said defendants, Emma Goldman and Alexander Berkman, unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves and with the said divers persons whose names are to the Grand Jurors unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with the regulations to be prescribed by the President, and upon proclamation by the President, wilfully, and so forth, not to register.

And then the indictment proceeds to state thereafter certain overt acts of the defendants.

Now, the crime of conspiracy requires two elements. One is the agreement, the other is the outward act, which in law is spoken of as the overt act. The word conspiracy means a confederation to effect an unlawful object, even by lawful means, or a lawful object by unlawful means.

The essence of conspiracy is the agreement or confederation. To constitute a conspiracy, it is not necessary that the two or more persons shall meet together, and enter into an explicit or formal agreement. It is not necessary that they should by direct words, or in writing, state what the unlawful plan, or the unlawful means are to be, nor need they set forth at length the details thereof nor the methods by which the unlawful combination is

to be made effective. It is sufficient if two or more persons in any manner, or through the contrivance of either, tacitly come to a mutual understanding to accomplish the thing or unlawful design. Where an unlawful thing is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that thing, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The conspiracy is formed and the foundation of the crime is laid when tacitly or expressly the agreement is entered into to accomplish a result that the law forbids.

The statute, however, requires not only that the actual agreement shall have been made, but that at least one of the parties to said unlawful agreement shall do some act to effect the object of the conspiracy; and therefore to warrant a conviction for conspiracy it must be found, first, that there was the agreement, which was conspiracy, and, second, that at least one of the conspirators performed some act to effectuate the object they had in view.

If that last essential is set forth, then all the persons who made the agreement, or who entered into it, no matter after it was made, are members of the conspiracy, no matter whether they all performed acts to effectuate its object, or whether they each performed all of the acts to effectuate its object.

Now, put into simple language, that means simply this: That two persons may enter into an unlawful agreement, and yet neither of them may ever do anything beyond that; and that is the reason that the law requires that there shall be some outward act, but there need be only one act to constitute the overt act. Many acts may be proved, many acts may not be proved, but if you once conclude that the agreement existed, then one act, whether it is lawful or unlawful in itself, so far

as it is in furtherance of the agreement, is sufficient to sustain an indictment for conspiracy, assuming always that these acts and the agreement are proved beyond a reasonable doubt.

You have had such presentation of the testimony, and you have listened to it so closely, that I shall not at this late hour review at any length what you have heard. I shall briefly refer only to certain salient features. What I do not refer to does not mean that I consider that of no importance, but it simply means that I have a desire at this hour merely to give you a very brief outline insofar as it will aid you in understanding the law of the case.

I may say here in passing that, as you well know, the jury is the judge of the facts, and in that domain is supreme, while from the Judge you must take the law, and be guided by his instructions as to the law. I may further say that if anything has been said by either the counsel for the Government or the defendants, or myself, that does not agree with your recollection as to the testimony, you will take your recollection and not theirs or mine.

On the 9th day of May, 1917, if my recollection is right, there was the first meeting of this No-Conscription League. That was followed by the meeting of May 18th, 1917, at the Harlem River Casino. The Government had a legal right to introduce evidence of that meeting, whether the acts there performed constitute in law an overt act, or not. The Government had the right to lay before you by the testimony of witnesses, what took place at that meeting, in order to disclose the intent of the defendants.

What is in a man's mind is discoverable only by what he says and what he does; and therefore it was entirely proper, as a matter of law, that everything that took place at that meeting should be presented to you.

Since the point was raised this morning as to whether or not the President had affixed his signature to the Act in question at the time that the defendant Emma Goldman was speaking, I have endeavored to ascertain when, as a matter of fact, that law was signed, or that Act was signed by the President, because it has been my purpose to have the trial conducted in strict accordance with law, and as fairly as I knew how. I have been informed by one of the representatives of a newspaper, that word was received by the New York newspapers, or at any rate by his, that the Act became a law at twelve minutes after ten that night.

I have also caused to be inquired by long distance telephone from the State Department, when the Act was signed, and the information from there is not sufficiently clear to enable me to say that it was signed prior to the time that the defendant Emma Goldman was speaking; and therefore, I think it but just to say that doubt must be resolved in favor of the defendants on the question of whether or not that was an overt act; and I will charge you, therefore, that that was not an overt act within the meaning of the statute, because of the doubt of proof as to the exact time when the Act was signed.

You may, however, consider, as I said before, everything which took place at that meeting, as indicating to you the purpose and intent of the defendants; and especially in connection with the subsequent acts either by way of meetings, speeches, or writings, which are here in evidence.

Much time was spent in regard to an expression used in that speech, according to the testimony of the two stenographers, or the two patrolmen assigned to stenographic work. What has been suggested or what has been testified to about violence was not germane to the case, and it becomes my duty, therefore, to repeat, perhaps a little more carefully, what I said to you in the course of the

trial. The officer Randolph went there, as you know, pursuant to the orders of his superior officer, for the purpose of making an exact stenographic report of what took place at that meeting so far as, in any event, Miss Goldman's speech was concerned.

The stenographer Caddell—Randolph and Caddell not knowing each other were present—was sent there with a similar view. In determining the credibility of the witnesses, you will apply, of course, the same good common sense that you do in the ordinary affairs of your lives. You may see the manner in which a man testifies, or a woman testifies, you may see how a witness acted upon the stand, you may ask yourselves in respect to these two men, sworn officers of the law, whether or not they would deliberately perjure themselves on the stand, or whether they would insert into their stenographic minutes and their transcript of those minutes, foreign matter utterly different from what was said. The report of Randolph was attacked by the defendants, and thereupon defendants produced certain witnesses to prove that from previous acts of the defendant Emma Goldman, her expressions as to violence had been contrary to that which was reported by Randolph. In addition to that there were read in evidence by the defendants, extracts from various articles. The defendants having introduced this evidence on the credibility of Randolph, this evidence of a collateral character, in addition to the direct evidence of those witnesses who said they had not heard that expression, it became as a matter of law, perfectly sound and proper to then permit the introduction of evidence showing any expressions of opinion upon this subject by either of the defendants, or any facts or circumstances whereby you could or could not infer, as you deemed best, that one or both of these defendants approved or disapproved certain expressions. It was under these circumstances that

the *Mother Earth* of July, 1914, came into the case. That paper being published, as appears from the paper itself, by the defendant Emma Goldman, at a time when the defendant Alexander Berkman was the editor, and a bundle of these papers some three years later being found in the office of the defendant Emma Goldman, it is for you to say on all the evidence in the case, what, as a result of it all, the credibility of the witnesses who were produced is in regard to this particular point. The defendants, as the District Attorney has said, and as they have said, are not on trial for violence, and the matter as I see it now, assumed an amount of importance in time which from my point of view it was not entitled to, although you take your point of view and not mine when I express an opinion of that character.

The real question is whether Randolph and Caddell correctly transcribed the speech of the defendant Emma Goldman, and told the truth in regard to all the speech, and especially in regard to those portions of the speech having to do with registration.

Now, we will pass from that to the meeting of May 23rd, held at Miss Goldman's flat, at which the defendant Alexander Berkman presided. You will take the letter, Exhibit L, to the jury room, and in connection with all the facts and circumstances you will determine the meaning of that letter.

The next meeting is the meeting on the eve of registration, the 4th day of June, announced by the handbills to take place at that date. That meeting was held at the Hunt's Point Palace. I am not referring to the details of these meetings, because they have been fully covered, and you are familiar with them, and there is no use taking up your time.

And then, in addition to that, you will recall, and may read, if you so desire, what was published

in *Mother Earth* and what was published in *The Blast,* and what was said at Forward Hall by one or the other of the defendants, as the case may be.

The expression, "We will defy your laws," or whatever the exact wording was, used at Forward Hall, may be taken as some light upon the intent of the defendants.

Now, words are elusive. It is sometimes very difficult to understand a phrase standing by itself, and therefore it is that when you read an article of any character, you should read the context, and if any person has done any acts in connection with that article, you analyze those acts in order to understand what the words mean.

Words are not always direct. Serious things may be accomplished by the use of words subtly and insidiously. A man may not, in so many words, advise, aid or abet another to do an act, yet he may so frame his language that the inference to be derived from it is clear.

In reading the language in regard to how the word "conscription" is used, you have the right to consider the occasion when used, the circumstances when used, and you have a further right in that connection to remember that registration under the Act, is the first necessary step prior to so-called draft or conscription.

Now, you can take all of this matter, and you can determine what the various words mean with the view of ultimately determining whether there was the conspiracy charged, to counsel, aid and abet and so forth, persons to violate the statute; and if you find, outside of the meeting of May 18th, in their speeches, or in the publications known as *Mother Earth* and *The Blast*, or in any of the writings or sayings of the defendants subsequent to May 18th, that there was counsel or advice or aiding or abetting other persons to violate the statute in question, and you find that be-

yond a reasonable doubt, then you will find the defendants guilty; because every one of these writings, and every one of these speeches, made after the 18th of May, was an overt act. And you will remember what I said, that if you once find the agreement to have been made, it is sufficient under the statute that there shall be one overt act.

Every defendant is presumed innocent until a jury finds him or her guilty, beyond a reasonable doubt. If the evidence justifies, in your judgment, that the accused are guilty, so as to exclude every other reasonable conclusion, you should declare them to be guilty. If you can reconcile the evidence before you with any reasonable hypothesis to sustain their innocence, then you will find the defendants not guilty. This old established rule does not permit you, however, a mere surmise or guess or conjecture that the accused or any of them are possibly innocent. You cannot base your judgment upon a merciful hope, for a reasonable doubt, as the words imply, is only such a doubt as will be entertained by a reasonable man after an impartial and thorough review of all the evidence and all the facts in the case, brought to his attention.

Of course a conspiracy requires two persons, so your verdict must be either that the defendants, both of them, are guilty, or that the defendants, both of them, are not guilty.

I may only say one thing more concerning which, perhaps, there can be little difference of opinion. Whatever may have been the fate of persons of historic note, whether the acts that they did were within or without the law, is quite immaterial in this case; this is a matter of law and order. The law must be obeyed. We are not dealing with a discussion of abstract principles. We are not concerned with the views of the defendants, whether they are right or wrong, on matters foreign to this case. We are only concerned with the evidence in the case.

If you believe them guilty beyond a reasonable doubt, it is a matter of no concern to you, nor to the Court, what their views may be. If you believe them not guilty, then equally are we not concerned with their political views.

I repeat in conclusion, and lay it upon you most earnestly, that this is not a trial of free speech. This is an indictment for crime, and the duty which rests upon you is to determine on the evidence whether or not the defendants are guilty of the crime charged in the indictment. Much has been said by the defendants and by the counsel for the Government as to what the country may think of your verdict. Gentlemen, we are within the solemn confines of the court room. All the country wants from you is a just verdict on the evidence, a verdict that I know you will render, because you have given such close attention, and confining yourself to that it is your duty by deliberate consideration to arrive at a conclusion on the evidence, not to permit yourselves, as I am sure you will not, to be diverted into any attempt to make it seem as though any person was here on trial for the expression of any opinion. The sole question is, has the Government proven the guilt of the defendants beyond a reasonable doubt? If so, your verdict is "Guilty"; if not, your verdict is "Not Guilty."

Any requests to charge? Any exceptions?

Mr. Content: No requests from the Government.

Mr. Berkman: I do not know what the procedure is about taking exceptions.

The Court: You can take any exceptions now. You must take them now.

Mr. Berkman: In particular, or general?

The Court: You must take particular exceptions. You may call the Court's attention to any error made.

Mr. Berkman: No particular exceptions, but, if permissible, just may I have a general exception?

The Court: You may. If there is anything—give me an idea of what you want on the record.

Mr. Berkman: Just as a matter of record.

The Court: As a matter of record, you say you want a general exception.

Mr. Berkman: Yes.

The Court: I will give it.

Miss Goldman: As a point of instruction, I want to know—I would like to ask your Honor to instruct the jury that as long as the articles are in evidence of July, 1914, representing the report of meetings, which is a legitimate method common among all large publications to reprint or report things that have happened in the way of news, that that shall be ruled out as evidence.

The Court: I get your point; I am glad you called my attention to it. The defendants are not responsible for the utterances of persons other than themselves in the July, 1914, meeting, as such. One article that was called "A Gauge of Chance," written by the defendant, was not a speech made at that meeting. You may take into consideration that papers publish speeches. You must also take into consideration whether from the relations of the defendants with these people and the finding of this bundle of papers in the *Mother Earth* office at the time of the arrest, whether the defendants approved the sentiments in those articles, all on the question of credibility.

Mr. Berkman: Two requests for the defendants: First, that the Court charge the jury that even if they believed one or both of the defendants committed an overt act, or had told people not to register, but not as a result of an agreement or a conspiracy, then the jury must acquit.

The Court: Certainly, that is quite right. If there is no agreement there cannot be a conviction.

Mr. Berkman: And the second one, we ask the Court to charge that all jurymen must be convinced beyond a reasonable doubt before they can find the defendants guilty.

The Court: I so charge.

Mr. Berkman: That even if one is not convinced of their guilt beyond a reasonable doubt he must vote for their acquittal.

The Court: My charge is that the entire jury must bring in their verdict, and the jury must be satisfied beyond a reasonable doubt.

Mr. Content: Will you just make this one point there, as long as it is raised: That your Honor charged that one overt act was enough; will you add there one overt act by one conspirator?

The Court: Yes, one overt act by one conspirator is enough. If you find the agreement, then the acts and words of one conspirator are admissible as against the other, and binding on the other.

(The Marshal was then sworn in charge of the jury, and the jury retired to the jury room.)

New York, July 9, 1917, 6 P. M.

(The jury returned a verdict of guilty at 6 P. M.)

Miss Goldman: We move to set aside the verdict as being against the weight of evidence. I think that is the way you move to set a verdict aside.

The Court: The stenographer may note that the motion is made, with all formalities, to cover all grounds upon which a motion to set aside a verdict may be made.

Miss Goldman: I wish to ask that sentence be deferred for a few days and that bail be continued —that the present bail be continued meantime— because we wish to arrange our affairs, which we have had no time or opportunity to do during the trial.

The Court: The motion to set the verdict aside is denied.

Mr. Content: The Government moves for sentence; and the Government feels, in a case of public importance like this case, that the judgment

and mandate of the Court should be speedily handed down.

Miss Goldman: Well, the motion of setting the verdict aside is denied; we have an exception, of course.

The Court: The motion in regard to the bail is denied. Application for that may be made under the practice of this Court to the Circuit Court of Appeals.

Mr. Berkman: The motion to defer sentence is denied?

The Court: Yes.

Mr. Berkman: Exception.

The Clerk: Alexander Berkman to the bar. Have you any reason why the sentence of the Court should not now be pronounced upon you?

Mr. Berkman: Well, I think it is only fair to suspend sentence, to give us a chance first of all to arrange matters. And the fundamental reason that sentence should not here be pronounced is that we are innocent of the charge and we are convicted as anarchists out of prejudice and bitterness. That is all.

The Clerk: Miss Goldman, have you anything to say why sentence should not be imposed?

Miss Goldman: I wish to say that the very fact that we were refused to have sentence deferred for several days to arrange our affairs proves that the Court is prejudiced because we are anarchists; because we were frank, and because we stood by our opinions, and because we are going to stand by our opinions.

Mr. Content: I have very little to say, your Honor. Both the Court and the jury were fully enlightened as to what the defendants did under the particular acts upon which they were charged. However, I should feel derelict in my duty to the Court if I did not inform the Court that in 1892 the defendant Alexander Berkman was convicted of attempted murder in Pittsburgh——

Mr. Berkman: I object.

Mr. Content: I have a right to say this.

The Court: He had no right to bring this to the Court's attention during the trial. He has a right to bring any matter to the Court's attention before sentence is pronounced.

Mr. Content: I beg to bring to the Court's attention that the defendant Alexander Berkman on July 22nd, 1892, was convicted in Pittsburgh, Pennsylvania, upon an indictment charging him with attempted murder. That he was sentenced upon that conviction to serve twenty-one years in the Western Penitentiary of Pennsylvania. And from my understanding of the record he served fourteen years out of this twenty-one years, having been released under the Pennsylvania law on parole at the expiration of two-thirds of his sentence.

I shall not refer to his other arrests, because that is the only other absolute conviction I have a record of; but I feel that the Court should take into consideration the fact that this man who says he does not believe in violence went to the office of a man and there shot him down in cold blood, or attempted to do so, without giving him a chance to fight for his life. And such is the man who believes in universal peace, and believes it is wrong for one human being to kill another human being in warfare. That is the sort of man who goes into another man's office and kills him, or rather tries to kill him, like a rat in a hole.

As to the defendant Emma Goldman, she has been a great disturber of the peace for many years. In 1893 she was convicted in this City before the late Judge Randolph Martine of unlawful assembly and inciting to riot and convicted under several indictments; and at that time she was sentenced to serve one year in the New York County Penitentiary at Blackwell's Island. And I call attention to the fact that in this case the witnesses for the People testified that Miss Goldman told the audience in

the German language, in Union Square, that if they did not get what they wanted peaceably, they should go into the homes of the rich and take it by force; if they did not get what they wanted in any other way, to go ahead and take what they wanted by force. She denied that charge on the witness stand and said she did not believe in violence at that time, but the jury found her guilty and she was sentenced to serve one year on Blackwell's Island by Judge Martine.

I will not refer to the other charges, because she has been arrested many times and convicted of minor offenses; but I believe that the Court has the right to know that when she was convicted for unlawful assembly and inciting to riot before Judge Martine she then denied having made the statements which were attributed to her, the same way as her witnesses have denied the use of certain language which would bring her under the particular statute here.

The Court: Gentlemen of the Jury, I wish you would remain, for I desire to say, before I may forget it, that I think the appreciation of the Court and of the community is due to you for your fearless and prompt manner in which you have discharged your duty. I do not wish to express a word that might be construed as in any manner flattering you, but I have never sat on any case where more earnest men have been jurymen who have paid closer and better attention to the case than you have; and I want my association in this case to be a remembrance of my appreciation.

The defendants may remain seated.

It has undoubtedly been a source of regret to the gentlemen of this jury, as it has been to the Court, and possibly to those who have sat in the court room for these many days, that the extraordinary ability displayed by the two defendants has not been utilized in support of law and order. The magnetic power of one of the defendants, if thus utilized,

might have been of great service in reforms legitimately advocated for the betterment of conditions as the world goes on. That power might have been of tremendous service, and more especially among the millions of humbler people who come to our country in an aspiration for liberty.

We understand, I think, what has been spoken of as the psychology of the defendants, and I am quite sure they understand what might be called the psychology of the courts.

We do represent the existing order of things in so far as that means that progress must be accomplished in this country by lawful means. We regard as enemies of the Government, in the most serious sense of that term, those who advocate the abolition of this Government, those who counsel disobedience to our laws, and those who induce the less strongly minded to disobey our laws. These may be very old and to some very tiresome sentiments. But they are the sentiments that from our point of view have become a part of our lives, won at great expense by the Revolutionary bodies, by the men who fought in the great Civil conflict, and by the men who now are willing to stand by their country when their country needs them. We have no place in this country for those who express the view that the law may be disobeyed in accordance with the choice of an individual. I am expressing not my view alone, I am expressing the views of what we in America understand to be the views of a true democracy and a true republic. The Government has thus far enacted no special statute to deal with those who counsel disobedience, and who advise insurrection, who seek to reach and control the humbler people, some of whom do not understand things, by methods such as were disclosed in this case. And I desire, so far as I am concerned, that my words shall be perfectly understood, not merely by those who are here, but by anyone else who has in his mind that he is stronger than the law. It

makes very little difference what becomes of a single administrator of the law, whether he be officer, Marshal, District Attorney or Judge. They come and go.

But in this country the law is an imperishable thing that lives forever. And it merely uses for the moment, as its administrators, some human beings who may at any time give way to others.

And so, when I impose this sentence, I am imposing it on the one hand with the regret that these abilities were not better used; I impose it on the other hand with the profound conviction that I am speaking for organized law, for the kind of liberty that we know and we understand who have been privileged to live in this country, that we believe is a true democracy.

The maximum sentence under the statute is two years and ten thousand dollars ($10,000) fine.

I sentence the defendant Alexander Berkman to the United States Penitentiary in Atlanta for two years and fine him the sum of ten thousand dollars ($10,000).

I sentence the defendant Emma Goldman to the State Penitentiary at Jefferson City, Missouri, for two years and fine her the sum of ten thousand dollars ($10,000).

I further direct the District Attorney, under the provisions of the Immigration Act, to forward to the Commissioner of Immigration the record of this conviction in order to determine in due course whether or not either or both the defendants are subject to the provisions as to deportation, provided in that act. That is a matter which is under the statute and administrative matter for the Commissioner of Immigration. And the District Attorney is directed to forward the record of this conviction to the Commissioner of Immigration.

I may say, in concluding, that the responsibility for the custody of the defendants is with the Marshal for the Southern District of New York. He

may exercise such discretion in that regard as he deems best.

The Court is now adjourned without date.

Miss Goldman: Just one moment, please. We wish to ask—as we intend to appeal the case—we wish to ask now for a last instruction and information whether we make the appeal now, or whether we have a certain time for the preparation of the appeal.

The Court: You have—under our rule—you have ninety days within which to sue out a writ of error. And in order that there may be no mistake or confusion on the subject the stenographer will note that the defendants may have ninety days within which to sue out a writ of error.

Miss Goldman: We should, however, like to know more specifically whether we may, after we are taken away from here, consult regarding the appeal, or whether we will be spirited away in a speedy manner. We would like to know that to be quite clear where we stand.

The Court: The fullest opportunity within the ninety days will be given to the defendants to consult counsel and prepare their assignments of error and the writ of error. If in the course of that period there is no such opportunity, the defendants may address a communication to the Court and the Court will see that such an opportunity is afforded them. As a matter of fact, such opportunity is your right during the coming ninety days.

Miss Goldman: Well, may I just ask, please, what the procedure is, as we don't know what it is, regarding whether we can now—I mean within the next hour or two—consult with counsel regarding the appeal? We ought to know that.

The Court: The custody of the defendants is with the Marshal, and the Marshal will deal with the matter referred to. The Court is now adjourned.

Miss Goldman: I wish to thank the Court for the marvelously fair trial we have received. I hope history will record the fairness; and history will also record, your Honor, that the two people asked for an adjournment, or rather a deferring of a sentence for two days to arrange their affairs, and yet the Court considered them so dangerous to the United States that it would not give them two days, which are given to the most heinous criminal. Thank you very much.

Government's Exhibit 1.

NO CONSCRIPTION!

Conscription has now become a fact in this country. It took England fully 18 months after she engaged in the war to impose compulsory military service on her people. It was left for "free" America to pass a conscription bill six weeks after she declared war against Germany.



What becomes of the patriotic boast of America to have entered the European war in behalf of the principle of democracy? But that is not all. Every

country in Europe has recognized the right of conscientious objectors—of men who refuse to engage in war on the ground that they are opposed to taking life. Yet this democratic country makes no such provision for those who will not commit murder at the behest of the war profiteers. Thus the "land of the free and the home of the brave" is ready to coerce free men into the military yoke.

No one to whom the fundamental principle of liberty and justice is more than an idle phrase, can help realize that the patriotic clap-trap now shouted by press, pulpit and the authorities, betrays a desperate effort of the ruling class in this country to throw sand in the eyes of the masses and to blind them to the real issue confronting them. That issue is the Prussianizing of America so as to destroy whatever few liberties the people have achieved through an incessant struggle of many years.

Already all labor protective laws have been abrogated, which means that while husbands, fathers and sons are butchered on the battlefield, the women and children will be exploited in our industrial bastiles to the heart's content of the American patriots for gain and power.

Freedom of speech, of press and assembly is about to be thrown upon the dungheap of political guarantees. But crime of all crimes, the flower of the country is to be forced into murder whether or not they believe in war or in the efficacy of saving democracy in Europe by the destruction of democracy at home.

Liberty of conscience is the most fundamental of all human rights, the pivot of all progress. No man may be deprived of it without losing every vestige of freedom of thought and action. In these days when every principle and conception of democracy and individual liberty is being cast overboard under the pretext of democratizing Germany, it behooves every liberty-loving man and woman

to insist on his or her right of individual choice in the ordering of his life and actions.

The No-Conscription League has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men. The No-Conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:

> We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.
>
> We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.
>
> We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.
>
> We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.

We are not unmindful of the difficulties in our way. But we have resolved to go ahead and spare no effort to make the voice of protest a moral force in the life of this country. The initial efforts of the conscientious objectors in England were fraught with many hardships and danger, but finally the government of Great Britain was forced to give heed to the steadily increasing volume of public protest against the coercion of conscientious objectors. So we, too, in America, will doubtless meet the full severity of the government and the condemnation of the war-mad jingoes, but we are nevertheless determined to go ahead. We feel confident in arousing thousands of people who are con-

scientious objectors to the murder of their fellow men and to whom a principle represents the most vital thing in life.

Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the government. Help us to publish literature against militarism and against conscription.

We consider this campaign of the utmost importance at the present time. Amid hateful, cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York.

Government's Exhibit 2.

HARLEM RIVER PARK AND CASINO
Second Avenue, 126th to 127th Streets
Harlem River Park Company, Proprietors
Hubert Motz, Gen'l Mgr.

New York, May 11th, 1917.

We, the undersigned, individually and as a committee of the NO-CONSCRIPTION LEAGUE, do hereby engage Harlem River Park and Casino for Friday, May 18th, 1917, for the purpose of a Mass-Meeting. Gates open at 7 p. m. and we do hereby agree to accept and make this contract, subject to all conditions described on reverse side, which form part of this contract, under penalty of a forfeiture of all rights or claims for the use of the above named place, or any part thereof, or of any money deposited or paid on account, and we hold ourselves individually and the said League, responsible on the following terms:

Harlem River Ball Room, rent to be $50.00
Deposit: $10.00
Balance: $40.00

For No-Conscription League,

ALEXANDER BERKMAN,
Committee.

For Proprietor Harlem River Park Co.,

H. MOTZ,
Managing Director.

Government's Exhibit 3.

This is a duplicate of Exhibit 2, but is marked as follows:

"Paid in full May 18, 17. Harlem River Park Co., H. Motz."

Government's Exhibit 4.

Leonard D. Abbott, Sec'y — Telephone
M. E. Fitzgerald, Fin. Sec'y — Harlem 6194

NO-CONSCRIPTION LEAGUE
20 East 125th Street
New York

WE oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.

WE will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.

WE believe that the militarization of America is an evil that far outweighs, in its anti-social and

anti-libertarian effects, any good that may come from America's participation in the war.

WE will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.

(Same cut as Government's Exhibit 1.)

May 25, 1917.

Dear Friend:

We are sure that you are interested in the anti-war agitation. You cannot fail to realize that the patriotic clap-trap which is now propagated on such a huge scale by the press, the pulpit and the authorities only represents a desperate effort to blind the people to the real issues confronting them. The main issue now is the Prussianizing of America.

Already America has demonstrated its autocratic tendencies in passing the Conscription Bill without making even the slightest proviso for conscientious objectors to human slaughter. There are thousands of men who will not under any circumstances allow themselves to be conscripted. First, they consider all wars a fight between thieves who are too cowardly to do their own fighting, hence force the masses to do the cruel thing for them. Secondly, they will not be conscripted because they refuse to be coerced into taking human life at the behest of their masters. Something must be done to sustain these men to whom the Ideal of Liberty and Human Solidarity is not a mere phrase, but a vital, living fact.

With that in view, we have organized the *No-Conscription League*. Its first public activity took place on Friday evening, May 18th—a mass meeting attended by 8000 men and women who pledged their decision not to register or to be conscripted into killing. It was an inspiring demonstration

and so tremendous in its scope that all the dailies were stirred from their usual attitude of silence.

More than any other government, perhaps, the Washington authorities are very sensitive to publicity and criticism, especially on the part of those who can reach large sections of the people both here and abroad. The American government cannot afford to have the world know that, while it pretends to be interested in democracy and to fight against Prussianism in Germany, it is at the same time Prussianizing America. We therefore feel that the agitation of the League, energetically started in New York and undoubtedly spreading over the whole country, will create sufficient sentiment to morally compel the authorities to recognize conscientious objectors.

Realizing this, we appeal to you for moral and financial support to enable us to carry on an effective campaign by means of meetings, (A Mothers' No-Conscription Demonstration to take place on the eve of registration day, June 4th, has already been arranged) manifestos and, above all, through the channels of *Mother Earth* and *The Blast*. We consider this campaign of the utmost importance at the present time, and we feel confident that you will not withhold from us your immediate generous support. Send your contribution at your earliest convenience.

Cordially,

BS&AU
12646

P.S. The *No-Conscription League* has published 25,000 manifestos, copy of which is enclosed.

Government's Exhibit 5.

(Same heading as Government's Exhibit 4.)

Dear Friend:

I know that you will be glad to learn that the NO-CONSCRIPTION MASSMEETING of Monday, June 4th, was the greatest event that has taken place in New York in many years. There were fully 35,000 that tried to gain admission. Only two thousand were allowed to enter the hall, but the thousands on the outside took up the applause that reached them from the meeting and filled the air with revolutionary songs. The enthusiasm was tremendous, and most inspiring. It is a miracle that a massacre was prevented because the police, the soldiers and the home guards were there ready for that purpose. But the temper of the great gathering was such that the authorities feared to go too far. Our people showed their determination to carry the fight against conscription to the end.

The great massmeeting was the first step in the campaign we are planning against conscription. The newspapers of this City admit that fully 20,000 failed to register, but we know that the number is at least four times as large and that half of those who did register did so protesting as conscientious objectors. There is no doubt that there will be terrible conflicts when the government begins conscripting the people. Meanwhile our work must continue with renewed hope and energy. Never in the history of this country have the revolutionary elements had a greater opportunity to demonstrate their loyalty to the ideals and principles of the International, and to give courage, inspiration and expression to the great masses of people in this country who are bitterly opposed to tyranny and war.

Dear Friend, I know that you realize the great importance of the work the NO-CONSCRIPTION LEAGUE is doing and that you will support our efforts. I therefore take the liberty of sending you a Subscription List. No doubt you know people who are opposed to war and conscription and whom you could interest to help us. Funds are urgently needed. The money collected is to be used not only for the No-Conscription agitation and literature, but also for a country-wide publicity in behalf of those who are falling into the clutches of the law. We ourselves may be arrested any moment, but we want the work to be in a condition to continue on a large scale in behalf of the conscientious objectors. I count on your co-operation. These are exceptional days and much can be done through the co-operative effort of the rebels of this country. I hope to hear from you soon.

Fraternally,

P. S. Letters, money orders and checks should not be addressed to the No-Conscription League (for obvious reasons) but to the undersigned.

Government's Exhibit 6.

This is a circular letter with the same heading as Exhibit 4. It begins "Dear Friend: Your letter of recent date received and your contribution has been credited toward the work of the League." The balance of the letter is identical with Exhibit 5.

Government's Exhibit 7.

(Envelope)

No-Conscription League	Postmarked	Canceled
20 East 125th Street	May 30, 1917	Stamp
New York	Station J.	

WILLIAM C. DEMOREST

18 E. 94th St.

N. Y. C.

Government's Exhibit 7-A.

This is a circular letter the same as Government's Exhibit 4, except that it is signed by Alexander Berkman and that on the bottom appear the words "Checks or money order to M. E. Fitzgerald."

Government's Exhibit 7-B.

This is a circular as follows:

NO - CONSCRIPTION
MASS MEETING
on the eve of registration
Monday, June 4, 8 P. M.

HUNTS POINT PALACE

953 So. Boulevard
One Block from Simpson St. Subway Station
All Bronx Cars Transfer



Auspices of No-Conscription League
of New York

SPEAKERS: Emma Goldman; Alexander Berkman; Louis Baury; "Mother" Yuster; Mrs. Stella Comyn Ballantine; Mrs. Shapiro; Leonard D. Abbott; Kate Siebel; Rose Yuster; Robert H. Hutchinson; Louis C. Fraina; Winter Russel and others, among them young men of conscriptable age.

Doors open 7 P. M.

Admission Free *Box Seats* 25c

Mothers, Fathers, Sons—Turn Out in Protest
Against Conscription!

Government's Exhibit 7-C.

This is a circular similar to Government's Exhibit 1.

Government's Exhibit 8.

(Envelope)

Postmarked May 31, 1917 Station F — Canceled Stamp

CITY EDITOR
New York Times
New York.

Government's Exhibit 8-A.

This is a circular similar to Government's Exhibit 1.

Government's Exhibit 8-B.

This is a circular letter similar to Government's Exhibit 7-A.

Government's Exhibit 8-C.

NO-CONSCRIPTION LEAGUE
20 East 125th Street
New York.

Please find contribution of $.....for the work of the No-Conscription League, and enter me on the membership list.

Name .....
Address .....

Government's Exhibit 9.

(Envelope of No-Conscription League)

Postmarked May 30, 1917 Station L — Canceled Stamp

CLARENCE LYMAN COLLINS

The Ansonia

N. Y. C.

Enclosed in this envelope were Government's Exhibits 9-A, 9-B and 9-C. They are similar to Government's Exhibits 8-A, 8-B and 8-C.

Government's Exhibit 10.

Postmarked May 25, 1917 Sta. L — Canceled Stamp

FRANK HARRISON
219 S. Penn St.
Denver Colo.

(Stamped across face) "Returned to writer."

Government's Exhibit 10-A.

This is a circular the same as Government's Exhibit 1.

Government's Exhibit 10-B.

This is a circular letter the same as Government's Exhibit 4, except that it is signed by Emma Goldman.

Government's Exhibit 10-C.

This is a subscription blank the same as Government's Exhibit 8-C.

Government's Exhibit 11.

This is an application to the New York Telephone Company for telephone service for office at 20 East 125th Street, dated May 12, 1917, and signed Alexander Berkman, subscriber.

Government's Exhibit 13.

This is a receipt for cut shown on Government's Exhibit 1, delivered by The Walker Engraving Co. to The Graphic Press, 63 Cooper Square, dated May 14, 1917, and signed M. Epstein. Also another receipt for a copy of the same cut signed by A. Berkman and dated May 14, 1917.

Government's Exhibit 14.

This is a receipt similar to Government's Exhibit 13, dated May 10, 1917, for an enlarged copy of the cut on Government's Exhibit 1. Also a receipt for a copy of same cut signed Alex. Berkman and dated May 10, 1917.

Government's Exhibit 15.

This is a receipt similar to Government's Exhibit 13, signed by Grayzel Press, Inc., dated June 1, 1917, and is for the cut used on the cover of the issue of *Mother Earth* marked Government's Exhibit 25. Also a receipt for a copy of the same cut signed "Mother Earth Pub. Ass'n."

Government's Exhibit 16.

This is a receipt similar to Government's Exhibit 13, for the cut used on the cover of the issue of the *Blast* marked Government's Exhibit 26, and dated May 31, 1917. The receipt is marked "Cancelled."

Government's Exhibit 17.

(Letterhead of No-Conscription League.)

June 4, 1917.

New York Produce Exchange Bank
Harlem Branch.

Gentlemen:—

We are sending you a number of checks made out to the order of the No-Conscription League. As you will see by the letter head Miss M. E. Fitzgerald is financial secretary. She has endorsed all of the checks and please place them to my credit.

Thanking you in advance.

Yours truly,

ALEXANDER BERKMAN.

I hereby authorize the New York Produce Exchange Bank to place any checks endorsed by me for No-Conscription League to the credit of account of Alexander Berkman.

Jun 4 1917.

M. E. FITZGERALD,
Fin. Secy.

Government's Exhibit 18.

Check stub book of Alexander Berkman's account in Harlem Branch of New York Produce Exchange National Bank. Stubs Nos. 65 to 96, inclusive.

Government's Exhibit 19.

Record book of subscriptions received by No-Conscription League, May 11, 1917, to June 10, 1917, inclusive.

Government's Exhibit 20.

Canceled check on New York Produce Exchange National Bank, Harlem Branch, signed Alexander Berkman, payable to Hotel Brevoort, June 12, 1917, for $46.75.

Government's Exhibit 21.

Same as Government's Exhibit 20 dated June 16, 1917, for $17.87.

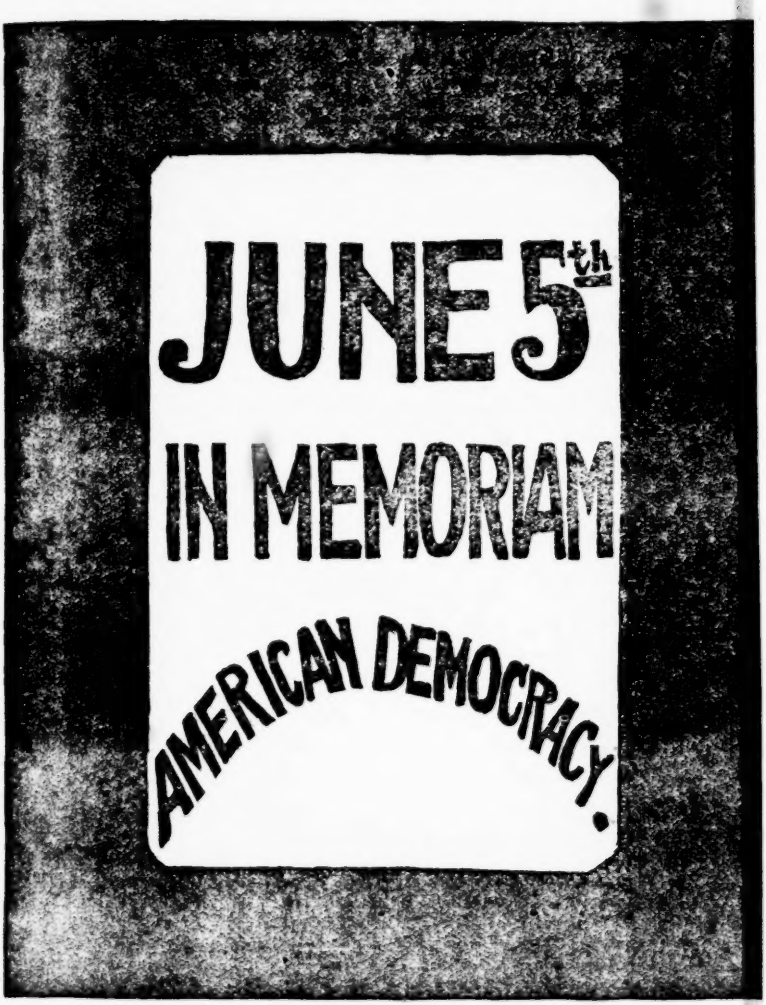
Government's Exhibit 22.

Same as Government's Exhibit 20 dated June 18, 1917, for $12.95.

Government's Exhibit 24.

This is a circular identical with Government's Exhibit 7-B.

Government's Exhibit 25.



The following are the material extracts from this exhibit:

MOTHER EARTH

Monthly Magazine Devoted to Social Science and Literature

Published Every 15th of the Month

EMMA GOLDMAN, Publisher and Editor, 20 East 125th Street, New York, N. Y.

Entered as second-class matter April 9, 1906, at the post office at New York, N. Y., under the Act of Congress of March 3, 1879.

Vol. XII. JUNE, 1917 No. 4.

* * * * * *

JUNE 5TH—

By Saxe Commins

Time is not the ally of those traducers of Democracy who enact laws which bind over their constituents irretrievably. Those opportunists know the value of haste, of secrecy and of ceremony, and they act accordingly. They have leisure not for repentance but for gloating over the fruits of their deception. And that deception promises nothing less than a permanent military organization, so well and so insidiously planned as to make it self-perpetuating. Moloch and Mammon are to be made immortal on Coronation Day—June 5th.

The ceremony is in preparation; none of its detailed rites is being neglected. To the lurid streamers, to the noise of the hurdy gurdy, with stage managed "spontaneity," will the free, proud youth of America proclaim their sovereign, a sovereign whose sway will be earthly and divine. Te Deum, Te Regem laudamus.

"It is to be a day of consecration and rejoicing" is the advance notice issued from the pulpit. To

us it will be a day of repudiation. The dawn of June 5th will be greeted with loud hosannahs and the crash of cannon, fitting tribute. Not the Hosannah which filled the valleys near the mountain on which it was said gently: "Thou shalt not kill," but the shrieked approval arising above the din of our stained cities, from each enclosed, vitiated recruiting station.

Elsewhere will be silent men on this day who will not be engulfed by the murky tide. They will go, each to his appointed task, oblivious to the sonorous beckoning of the mob. They will be those few who though deprived of time for consideration of the subtleties of the registration law had the foresight to plan a course of action for just such a contingency. Others there will be who will waver and fall prey to the influence of ritualistic contagion. For their consideration during the few days that remain before the Fifth, we direct not our counsel but the attitude we have taken for ourselves. We do not wish to impose our programme on any one, we only can point the road we take ourselves.

"We have been deprived of time for reflection and have lost, consequently, our critical judgment. We have not been able to crystallize our thoughts, we have not been able to find kindred thoughts for the few that we have been able to crystallize. Where ours were definitely formed, others have been vague. And there was always conflict on this issue. What is to be done? Whatever protest is to be made must be made in full consciousness, else it is worthless. We know we must dissent, it is agreed. But how? By doing so may we not be acting precipitately and unwisely? We want to make of this a pure issue of Principle, but we have not been able to put into words, for lack of time, our most deeply rooted emotions. . . ." These are some of the many doubts and questions that assail the minds of numberless conscientious objec-

tors as June 5th approaches. What, then, is to be done?

We can decide for no one. We do not claim omniscience, nor the gift of prophecy. But we can point out certain self evident truths. Draw from them your own conclusions and decide your course of action.

The conscription bill, to which liberals, generally, are opposed, carries hidden beneath it well defined facts which must be revealed. In its entirety this act is the instrument of a powerful despotism, more harmful by far than are visible and destructible armaments. We know that this bill perverts the meaning of the much advertised war theme—Democracy. These facts are too manifest for reiteration. There are no subtle distinctions made by liberty loving people in their objection to conscription in toto. Why, then, should there be no militant objection to the first integral part of it—REGISTRATION?

Only one interpretation can be assigned to the acceptance of this major portion of the conscription bill by those who are opposed to war, and that is due to their lack of time for reflection. Secrecy has obscured its features too long. Registration is literal and final in its meaning. *It is the first step over the precipice into the bottomless pit of conscription.* It is the first and only step necessary toward the establishment of an institution only comparable to the now extinct Third Section of Russia. It is the resignation of the rights of the individual to a militarily supervised government. It implies the abrogation of every instinct as well as any principle you may have against bearing arms. It means that you sanction and wilfully choose obedience and that you repudiate your right to resistance. . . .

Do what your conscience dictates on June 5th and thereafter.

* * * * * *

THE NO CONSCRIPTION LEAGUE

Conscription has now become a fact in this country. It took England fully 18 months after she engaged in war to impose compulsory military service on her people. It was left to free America to pass a conscription bill six weeks after war was declared.

What becomes of the patriotic boast of America to have entered the European war in behalf of the principle of democracy? But that is not all. Every country in Europe has recognized the right of conscientious objectors—of men who refuse to engage in war on the ground that they are opposed to taking life.

Yet this democratic country makes no such provision for those who will not commit murder at the behest of the profiteers through human sacrifice. Thus the "land of the free and the home of the brave" is ready to coerce free men into the military yoke.

Liberty of conscience is the most fundamental of all human rights, the pivot of all progress. No human being may be deprived of it without losing every vestige of freedom of thought and action. In these days when every principle and conception of democracy and individual liberty is being cast overboard under the pretext of democratizing Germany, it behooves every liberty loving man and woman to insist on his or her right of individual choice in the ordering of his life or action.

The NO-CONSCRIPTION LEAGUE has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to translate their objection to human slaughter by refusing to participate in the killing of their fellow men. The NO-CONSCRIPTION LEAGUE is to be the voice of protest against war and against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:

We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.

We will fight for what we choose to fight for: we will never fight simply because we are ordered to fight.

We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.

We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.

The first important public activity of the No-CONSCRIPTION LEAGUE took the form of a large mass-meeting on May 18th, attended by 8,000 people. The enthusiasm was so great that the uniformed patriots who came to break up the meeting, soon slunk courageously away. A Mothers' No-Conscription meeting has been arranged for June 4th. Besides, 100,000 No-Conscription manifestos have been circulated broadcast.

We are not unmindful of the difficulties in our way. But we have resolved to go ahead and spare no effort to make the voice of protest a moral force in the life of this country. The initial efforts of the conscientious objectors in England were fraught with many hardships and danger but finally the government of Great Britain was forced to give heed to the steadily increasing volume of public protest against the coercion of conscientious objectors. So we, too, in America will doubtless meet the full severity of the government and the condemnation of the patriotic jingoes, but we are nevertheless determined to go ahead. We feel confident in bringing out thousands of people who are conscientious objectors to the murder of their fellow men and to whom a principle represents the most vital thing in life.

Will you help us in this great undertaking? Will you enable us to carry on the fight? Send your contribution to me at once, to 20 E. 125th St., New York. Send for manifestos.

EMMA GOLDMAN.

* * *

THE TURNING OF THE TIDE

By S. W. Van Valkenburgh

Democracy! The rule of the ruled! O, how gullible, these sheep being fattened for the slaughter! Russia rises, as from a trance and proceeds to establish a semblance of popular government and bring the people back to the land—their own land—only to have this much heralded republic dispatch uninvited advisers, headed by that arch-American-autocrat, Elihu Root, to tell a people born and reared in revolution what they want and how to get it! Democracy! A country wherein the President has more absolute power bestowed him through the recent Congressional enactments than any other living ruler: a country where the conscientious objector has no legal status whatever; where the young men happening to marry after a given time are publicly branded as "traitors;" where one might not go to a theatre or other public place without having to prostrate one's self before the National emblem and to stand attention as the music peels off the squeaky National air: where one dare say nothing, do nothing and think nothing, unless it conforms to the hysteria of the times: where a victim of the patriotic mob is told by an unfeeling brute, called a judge, that if the mob had lynched him, he would have received his just deserts; where one's mail is now subject to the prying post-office pests whose arbitrary decisions as to what is "seditious and anarchistic" mean imprisonment of the alleged offender: in such a country, presuming to call itself free, and, not only tolerating such in-

families, but continually adding to them, in such a country, the cry of Democracy were enough to make old Pericles awake and congratulate himself!

* * * * * *

(Back of Cover)

NO CONSCRIPTION MASS MEETING
On the Eve of Registration
Monday, June 4, 8 P. M.
HUNT'S POINT PALACE
953 South Boulevard
One Block from Simpson Street Subway Station
All Bronx Cars Transfer
Auspices of

NO CONSCRIPTION LEAGUE OF NEW YORK

Speakers: Emma Goldman; Alexander Berkman; Harry Weinberger; "Mother" Yuster; Mrs. Stella Comyn Ballantine; Mrs. Shapiro; Leonard D. Abbott; Kate Siebel; Rose Yuster; Robert H. Hutchinson; Louis Baury; Winter Russell; C. L. Fraina and others, among them young men of conscriptable age.

Doors open 7 P. M.

Admission Free Box Seats 25c

Mothers, Fathers, Sons—Turn Out in Protest Against Conscription!



YOUNG RUSSIA:—"What's the idea?"
YOUNG AMERICA:—"Democracy!"
YOUNG RUSSIA:—"Well, You know how I got mine."

Government's Exhibit 26.

THE BLAST

Vol. II. NEW YORK, JUNE 1, 1917 No. 5

The following are material extracts from this exhibit:

REGISTRATION

Registration is the first step of conscription.

The war shouters and their prostitute press, bent on snaring you into the army, tell you that registration has nothing to do with conscription.

They lie.

Without registration, conscription is impossible.

Conscription is the abdication of your rights as a citizen. Conscription is the cemetery where every vestige of your liberty is to be buried. Registration is its undertaker.

No man with red blood in his veins can be forced to fight against his will.

But you cannot successfully oppose conscription if you approve of, or submit to, registration.

Every beginning is hard. But if the government can induce you to register, it will have little difficulty in putting over conscription.

By registering you wilfully supply the government with the information it needs to make conscription effective.

Registration means placing in the hands of the authorities the despotic power of the machinery of passports which made darkest Russia what it was before the Revolution.

There are thousands, perhaps hundreds of thousands of young men in this country who have never voted and who have never paid taxes, and who, legally speaking, have no official existence. Their registration means nothing short of suicide, in a majority of cases.

Failure to register is punishable by imprisonment. Refusal to be conscripted may be punishable by death.

To register is to acknowledge the right of the government to conscript.

The consistent conscientious objector to human slaughter will neither register nor be conscripted.

Alexander Berkman.

* * * * * *

WAR DICTIONARY

Alexander Berkman

Allies—The fairies of Democracy.

Barbarians—The other fellows.

Congress—The valet of Woodrow the First.

Censorship—The rape of Free Speech.

Conscription—Free men fighting against their will.

Civilization—In God We Trusts.

Democracy—The voice of the Gallery Gods.

Free Speech—Say what you please, but keep your mouth shut.

Huns—Loyal patriots from Central Europe.

Humanity—Treason to government.

Justice—Successful target shooting.

Loyal Citizen—Deaf, dumb and blind.

Kaiser—A President's ambition.

Liberty Loan—The bread line of the Unborn.

Liberty Bond—A bone from a bonehead.

Sedition—The proof of Tyranny.

Militarism—Christianity in action.

Patriotism—Hating your neighbor.

Registration—Funeral march of Liberty.

Slacker—Jesus Christ.

Trenches—Digging your own grave.

Un-American—Independent opinion.

Un-Democratic—Ideals.

Uniform—Government strait-jacket.

Victory—Ten million dead.

War—The propaganda of Democracy.

* * * * * *

We are not pacifists. But we want to know what we are fighting for, and we refuse to fight for the enemies and the exploiters of humanity.

Government's Exhibits 27 and 28.

Receipts showing delivery by Buckley & Wood of bundles containing copies of *Mother Earth* and *The Blast* to 20 East 125th Street, New York City.

Government's Exhibit 29.

Copy of the June, 1917, issue of *Mother Earth* similar to Government's Exhibit 25, with the name "Hagerty" written in ink on the cover.

Government's Exhibit 30.

Stenographic notes by William H. Randolph of the speech by Emma Goldman at the meeting at Harlem River Casino, transcript of which notes is Government's Exhibit 31.

Government's Exhibit 31.

SPEECH BY EMMA GOLDMAN IN HARLEM RIVER CASINO, 127TH STREET,

9:45 P. M., May 18, 1917.

We don't believe in conscription, this meeting tonight being a living proof. This meeting was arranged with limited means. So, friends, we who have arranged the meeting are well satisfied if we

can only urge the people of entire New York City and America, there would be no war in the United States—there would be no conscription in the United States—(applause)—if the people are not given an opportunity to have their say. Therefore, we hope at least that a small portion of the population of New York City tonight is having its say.

Friends, what I have to tell you tonight I want to impress upon your minds with all the intensity of my being, that we have with us people who came to break up this meeting, and therefore, friends, I ask you, friends, in the name of peace, in the name of freedom, and all that is dear to you, to be perfectly quiet, and when the meeting is over to leave the hall quietly, for that is a better argument than by the provocators who came here tonight to break up the meeting. Therefore, friends, I repeat once more, that after our speakers will be through, I hope you will leave the hall quietly, and, if there is the slightest trouble, we will hold the trouble-makers, the provocators and the police responsible for the trouble (applause).

Friends, I know perfectly well that tomorrow morning the daily papers will say that the German Kaiser paid for this meeting. I know that they will say that those employed in the German service have arranged this meeting. But there is all of us, friends, who have something serious at hand—those of us to whom liberty is not a mere shadow—and found to be celebrated on the 4th of July, and to be celebrated with fire crackers—that we will not only speak for it, but die for it if necessary (applause).

We are concerned in our own conscience, and we know that the meeting tonight has been arranged by working men and working women, who probably gave their last cent from their wages which the capitalistic regime is granting them.

And so, friends, we do not care what people will say about us, we only care for one thing, and that

is to demonstrate tonight and to demonstrate as long as we can be able to speak, that when America went into war, ostensibly for the purpose of fighting for democracy—because it is a dastardly lie—it never went into war for democracy. If it is true that America went into war in order to fight for democracy—why not begin at home? We need democracy (applause). We need democracy even more than Germany, and I will tell you why. The German people were never brought up with the belief that they lived in democracy. The German people were nursed from their mothers' breasts that they were living in liberty and that they had all the freedom they desired. Therefore, the German people are not disappointed in the Kaiser. They have a Kaiser, the kind of a Kaiser they want and are going to stand for.

We in America have been brought up, we have been told that this is a free Republic. We have been told that free speech and free press and free assembly are guaranteed by the Constitution. Incidentally, friends, the only people who still believe in the Constitution are you poor fools for the other fellows (applause). We are rather disappointed. When suddenly, out of the clear sky, a few months after we have been told he kept us out of war—we are now told he drew us into war (applause).

We, who came from Europe, came here looking to America as the promised land. I came believing that liberty was a fact. And when we today resent war and resent conscription, it is not that we are foreigners and don't care, it is precisely because we love America and we are opposed to war (applause).

My friends, when I say we love America, I wish you to remember that we don't love the American Wall Street, that we don't love the American Morgan, that we don't love the American Rockefeller, we don't love the American Washington, we don't love the American ammunition manufacturers, we

don't love the American National Security League —for that America is Russia transferred to America (applause).

We mean the America of Wendell Phillips, we mean Emerson, we mean America of great pioneers of liberty. We mean writers, and great men and women, who have fought for years to maintain the standard of effort. I, for one, am quite willing to stand up face to face with patriots every night—patriots blind to the injustice committed in this country—patriots who didn't care a hang. We are willing to stand up and to say to them: "Keep your dirty hands off America." You have no right to tell the people to give their lives in behalf of democracy, when democracy is the laughing stock before all Europe. And therefore, friends, we stand here and we tell you that the war which is now declared by America in the last six weeks is not a war of democracy and is not a war of the urging of the people. It is not a war of economic independence. It is a war for conquest. It is a war for military power. It is a war for money. It is a war for the purpose of trampling under foot every vestige of liberty that you people have worked for, for the last forty or thirty or twenty-five years and, therefore, we refuse to support such a war (Hurray—applause).

We are told, friends, that the people want war. If it is true that the American people want war, why not give the American people a chance to say whether they want war. Friends, we were told that the American people have a chance to say whether they want war through Congress and through the Senate. Congress is in the hands of those who pull the string. It is a jumping jack (applause).

Friends, in Congress there are a few men in the Senate (mentioning some names) who wanted to keep America out of war. They have been hounded and persecuted and abused and insulted and degraded because they stood up for a principle. And

so it was not true that the people of America have a chance to express its views. It was impossible, because each Congressman and each Senator is taken into a private room where spiritualistic mediums are being used, and they are mesmerized and massaged until every revolutionary fibre is out of them, and then they come out and do as they're told by the administration in Washington.

The same is true about conscription. What chance have you men, to say, if you men are to be conscripted. It took England eighteen months—a monarchy—to decide whether she shall have conscription. Upon the people born under a free sky—conscription has been imposed upon you. You cannot have democracy and have compulsory military training. You have become Russia (applause).

Friends, I suggest that Wall Street and the military powers invite the Russian Czar to America—he belongs here—and tell them how to deal with the revolution, with the anti-militarists—the Czar ought to know, he handled them. He used every method in his power in order to subdue all human beings. But he succeeded—I should say not. He is now sitting in his palace, that the revolution may go a little further (applause). Americans evidently are working for the Czar. We already have the beginning of the Czar, who wants to employ all of the liberties of the American people.

Now, friends, do you suppose for one minute that this Government is big enough and strong enough and powerful enough to stop men who will not engage in the war because they don't want the war, because they don't believe in the war, because they are not going to fight a war for Mr. Morgan? What is the Government going to do with them? They're going to lock them up—You haven't prisons enough to lock up all the people (applause).

We believe in violence and we will use violence. Remember, friends, that the very Government which worships at the altar of the Christian religion, that

this very Government knows perfectly well, that they attempted to silence them. And so, if it is their intention to make us quiet, they may prepare the noose, they may prepare the gallows, they may build more prisons—for the spread of revolt and conscience (applause).

How many people are going to refuse to conscript, and I say there are enough. I would count at least 50,000, and there are enough to be more, and they're not going to when only they're conscripted. They will not register (applause).

I realize perfectly, that it is impossible to gather up 50 and 100 and 500 people—and what are you going to do if you have 500,000 people? It will not be such an easy job, and it will compel the Government to sit up and take notice and, therefore, we are going to support, with all the means at our support with money and publicity—we are going to support all the men who will refuse to register and who will refuse to fight (applause).

We want you to fill out these slips and as you go out drop them into the baskets at the door. We want to know how many men and women of conscriptive age—and they're going to take women and not soldiers. It is the same thing as if you fight in the war. Don't let them tell you that they will send you to the farm. Every stroke of what you do you are supporting the war, and the only reply that you can make against the war is that you are making men—that you are busy fighting your internal enemy, which is the capitalistic class (applause).

I hope that this meeting is not going to be the first and last. As a matter of fact, we are planning something else.

Friends, listen, think of it. Not only are you going to be compelled—coerced—to wear the soldier's uniform, but on the day when you leave to be educated to the monster war, on the day when it will be decided that you shall be driven into the

trenches and battlefield, on that day we are going to have a demonstration (applause), but be careful whom (applause)—you might bury yourself and not the working class (applause). We will have a demonstration of all the people who will not be conscripted and who will not register. We are going to have the largest demonstration this city has ever seen, and no power on earth will stop us.

I will say, in conclusion, that I, for one, am quite willing to take the consequences of every word I said and am going to say on the stand I am taking. I am not afraid of prison—I have been there often. It isn't quite so bad. I am not afraid of the authorities—I have dealt with them before—and rather, they have dealt with me, and am still living and stand here before you. I am not afraid of death. I would rather die the death of a lion than live the life of a dog (applause).

For the cause of human liberty, for the cause of the working class, for the cause of men and women who live and till the soil—if I am to die for them, I could not wish a more glorious death ever in my wildest dreams. And so, patriots, and police, and gentlemen, who represent wealth and power, help yourself—you cannot stop the revolutionary spirit. It may take as long as one year or two. You cannot do it, because the spirit of revolution has a marvelous power of liberty. It can break through bars—it can go through safely. It can come out stronger and braver. If there is any man in this hall that despairs—let's look across Russia—let's look across (applause). Als—who was tortured by the Russian soldiers, who never believed that she would see Russia and see her people alive, and yet see the wonderful thing that revolution has done. It has thrown the Czar and his clique and his ever staunch henchmen into prison. It has opened Siberia and all the dungeons, and the men and women are going to be free. They are not go-

ing to be free according to American democracy (applause).

Friends, I insist it is a good place for them in Russia. Let's go back home tomorrow. So, friends, don't be afraid. Take this marvelous meeting, take this wonderful spirit, and remember that you are not alone—that tonight, in every city, in every hamlet and in every village and town, there are hearts beating that they don't want war, that they don't want conscription—that they are not going to be conscripted.

The ruling classes fight a losing game. The Wall Street men are fighting a losing game. They represented the past and we represent the future (applause).

The future belongs to the young men, who are barely of age and barely realizing their freedom. The future belongs to the young girls and young boys. They must be free from militarism. They must be free from the military yoke. If you want war, help yourself. Fight your own battle. We are not going to fight it for you (applause).

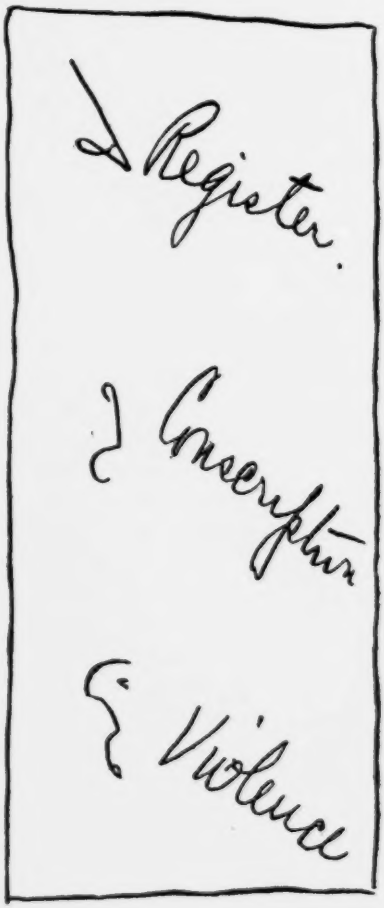
So, friends, it is our decision tonight. We are going to fight for you, we are going to assist you and co-operate with you, and have the grandest demonstration this country has ever seen against militarism and war. What's your answer? Your answer to war must be a general strike, and then the governing class will have something on its hands.

So, friends, before I close, I want to make an appeal to you. I want to make you know that this meeting sprang simultaneously from a group of people. It cost money and therefore I ask you to contribute as much as you can. I wish to say that Mother Earth is opening pledges with $50. I hope that those who can do so will do so. We want to have money, we want to have more literature, we want to have a demonstration, and we want to

prove that with little money, no public support, with no militia, with no soldiers, we can support the point of real freedom and liberty and brotherhood.

(Finished speaking about 10:15 P. M.)

Government's Exhibit 32.



Government's Exhibit 33.

STENOGRAPHER'S MINUTES

MEETING OF
NO CONSCRIPTION LEAGUE
HUNTS POINT PALACE
NEW YORK, JUNE 4TH, 1917.

STENOGRAPHY SERVICE CO.

Downtown: 55 Liberty Street (Liberty Tower)
Uptown: 47 West 42nd Street, corner 6th Avenue
New York

* * * * * *

MR. ALEXANDER BERKMAN: Comrades, friends and enemies (Great Applause) and everyone who believes in freedom of thought and liberty. We had a demonstration here a moment ago as to who believes in free speech. The militarists, the false patriots and the others have mass meetings tonight. They have mass meetings this evening. They have meetings tomorrow. We did not send our men to disturb their meetings. (Great applause and hurrahs.) And who believe in liberty? Do we believe in liberty or do they? We say to you, and I mean all of you, I mean these detectives, these Federal men, soldiers and sailors, we say to all of you, if you want war, go ahead. We believe in liberty, but you can go ahead. (Applause and cheers.) But we say further to you, if you believe in liberty, if you pretend to fight for liberty and democracy how can you force us to do what we don't want to do? (Great applause and cheering). I see a few, or rather quite a number of young men in uniform in this audience, and I want to know when they look into their own consciences if they do not think that I am not making a speech, but I am talking common sense. That should appeal to you, if you really have a sense of justice. America says we

are going to fight Germany. Why? They say we are going to fight Germany because we want to give them liberty and democracy. If you believe that you can give a people liberty and democracy from the outside, if you believe you can give a people or a nation liberty at the end of a bayonet or with bullets, go ahead. We don't object. We shall not interfere. But if you are so generous with liberty as to carry it to Germany across the sea, why don't you retail liberty right here in this country. (Applause.)

A Voice: Are you a citizen?

Mr. Berkman: I have the floor just now. If you want the floor later, we believe in free speech and will give it to you. There is no greater boon in the world than liberty. There is nothing greater in the whole universe than freedom of conscience, freedom of opinion and freedom of action, in short liberty. But it is we who are fighting for liberty, and no one else, not those who oppose us. We have been fighting for liberty for many years, and even for the liberty of those who oppose us. (Great Applause.)

A Voice: You know what Rabbi Wise said?

Other Voices: Shut up, shut up.

(There were many boos and great confusion. Someone threw something at the speaker.)

Mr. Berkman: I want this man to speak out what is in his heart. That is all right. I say this is a solemn moment. Men and women and soldiers and others, do not make light of this. You are the sons of mothers, even if you are in uniform. You want to go to the front. All right. But consider what you are doing and consider whether you have the right to suppress those who do not believe as you do. Consider well, especially if you pretend to fight under the banner of free speech and liberty. Consider that. Take that home with you to your barracks. Think it over. You have never heard patriots talk to us like that. We talk to you like

that. We don't throw glasses or bricks at you. We say to you consider, look into your own hearts and do what you think is right. But you can't think it is right to suppress the other fellow because he thinks differently. You can't believe it in your own hearts or you would have less to say in opposition to us, and you would be less, much less than human. We are here to say what we believe, just the same as you are in a hundred and one halls all over the City, in thousands of halls all over the country today to say what you believe. That means liberty of speech, and for liberty I am the first to fight. (Great applause.)

This is a most serious moment. Let me tell you, if you know what is happening in the country today, that you know that this is one of the most tragic moments in the life of this country. Don't make light of it, because it is the most terrible and tragic moment in the life of the country. Conscription in a free country means the cemetery of liberty, and if conscription is the cemetery then registration is the undertaker. (Great applause and cheers and boos, and something thrown at the speaker that looked like a lemon.)

All right, I am talking now; you can talk later. (Some one in the gallery threw something at the speaker and said something the stenographer could not understand.) Those who want to register should certainly register, but those who know what liberty means, and I am sure there are thousands in this country, they will not register. (Many hurrahs and great applause.) There have been many black days, many black Fridays, and black Sundays in the history of this country. Black days for labor when those who feed you were shot down on the streets because they were for better conditions of living. There have been many black days for labor. But there is going to be a blacker day, not a black Friday, but a black Tuesday. (Great applause.) And I believe that those who realize the full sig-

nificance of forcing a supposedly free country into an armed camp, those who realize that should put on mourning tomorrow. They should mourn the loss of the country's liberty. It is not a day for rejoicing. You rejoice over something that brings you happiness, joy, freedom. But something that means your further enslavement, something that means the coercion of you to do things against your conscience, against your nature, against the dictates of everything that is fine in you—things like that should be mourned and wept over, and not made a holiday of. It is a tragic moment to me, because I love the American people more than those who want to enslave them towards the profit of Morgan and others. (Applause.)

Neither the soldiers of this country nor the workers have any enemies across the ocean. The soldiers and the workers and all those who really have to work mentally or physically, for their bread and butter, they have no enemies there. They have an enemy right here in this country; (Applause) they have an enemy that makes money, millions and millions of it, out of your blood, out of small children and widows, by putting them in sweat shops, by working them all hours, (Great Applause) (Some one in the gallery threw something at the speaker which broke the glass on the table in front of him and the rest of the remarks to finish the sentence were not heard.) Those are the enemies we have.

A Voice: You are the enemy.

Mr. Berkman: I have no more love for these exploiting American enemies than I have for the German Kaiser. (Some one in the gallery shouted, "go back to Europe where you belong. You are not an American citizen anyhow." Also some one threw something that broke one of the electric globes in the footlight row.)

Mr. Berkman: No, no, gracia. Hence, consider a certain country across the ocean. Look at Rus-

sia. There are workers and soldiers that know what they are about. (Great applause and confusion. Many voices from the gallery.) You believe in free speech, go and fight for your country. They are soldiers the same as we have in this country. They are workers the same as we have in this country. And let me tell you they know that eight hours is a working day there. (There was considerable confusion in the gallery, and evidently a struggle of some sort went on up there.)

No argument there (Referring to the gallery.) Sit down. Everybody keep their seats. (There was great confusion, People standing up around the hall.) Keep your seats. We know there are men here to break up this meeting.

Emma Goldman: One moment. There are United States soldiers here who are on duty. Soldiers—now, no argument there.

Mr. Kane: Listen to an American citizen.

(Meanwhile there was great confusion throughout the hall.)

Mr. Berkman: I don't believe these soldiers are real Americans. My friends, do you know what is happening in Russia today? Do you know that eight hours work is what the workers want in every country? Do you know what is good for the workers? Do you know what the soldiers of Russia are helping the workers in that country to do? Do you know that after all the cause of the soldiers and workers is the same everywhere. (Great excitement and Miss Goldman assumes charge.)

Miss Emma Goldman: Please be quiet; please be quiet. (Great applause and cheers.) Friends and fellows workers. Friends, don't you know that the soldiers came here to disturb the meeting? (Many voices yes, yes.) I ask you all to keep quiet, no matter what the soldiers do. I demand of you to keep absolutely quiet. Let them disturb the meeting. We are not going to disturb the meeting. (Applause)

Friends, workers, soldiers, detectives and police. (Laughter and hisses and applause) I am going to speak to you all. I am surprised that the police here don't stop the soldiers from breaking the lights. (Hurrahs and applause. Throughout Emma Goldman's remarks she was so frequently interrupted by applause that reference will not be made to the times.) Friends, please don't applaud, time is too precious. If the police don't stop the soldiers from breaking the law is it because the police are afraid of the soldiers? I hope that they will preserve order. Now, friends, if this meeting would not take place at all, I think you should know that there are twenty thousand people outside waiting to get into this hall, to prove to you more than anything that we can say that the people of New York who think, don't want war and don't want conscription and don't want militarism. At the same time we consider ourselves more consistent than those who believe in war and believe in militarism. We say that those who believe in war, believe in conscription and in militarism and should do their duty and fight. We have no objection against it, but we refuse to be compelled to fight when we don't believe in war and when we don't believe in militarism and when we don't believe in conscription. Now, why don't we believe in war and in militarism? The good papers of this city have told you that because we are pro-Germans we do not believe in war and we do not believe in militarism. That is an unbelievable lie. I am just as much opposed to the German Government as I am to the American Government —and why do I not believe in militarism? I will tell you why. When I was eight years of age my father had a government position, and every year compulsory military registration was required. The highest officials of Russia would come to our place, the heads, the representatives of militarism, and would there compel the youth of our land, the peasant boys to become soldiers. And at that time

the mothers and the fathers of the whole community turned out in mourning and considered it a day of sorrow and of tears and of pain when their sons were taken away into the Army. It impressed itself with indelible power upon my mind and upon my conscience. Ten years later, when I came to America, I was told that this was the land of the free, that no man is compelled to be a soldier in America. I actually believed that this was the promised land, the land that rests upon freedom, upon opportunity, upon happiness, upon recognition of the importance and the value of the young generation. But since that day twenty seven years almost have passed, and I have come to the conclusion that when the law for conscription was passed in the United States the Funeral March of 500,000 American youths is going to be celebrated tomorrow, on Registration Day. I am opposed to Militarism because I have seen since my early childhood what it means to sacrifice a young man, who has hope and youth and a life of opportunity before him, on the altar of militarism. I, therefore, promised myself, even as a child, that as long as I lived, and as long as my voice carried, I shall cry out against compulsory militarism, against conscription. My friends, we are told that the people want war. If the people of America want war, if the people of New York City want conscription, how does it happen that this city is going to muster up not only the entire police department, but the National Guard and a body of parasites known as the Home Guards, who have nothing else to do? Now, my friends, I ask you why do you have to muster up your police, soldiers, Home Guards and National Guard to celebrate your Registration Day? If the people want war, why so much police, why so many soldiers to compel them to become soldiers? If the people want war, why not give them a chance to say that they do? If you want to sacrifice their sons upon the altar of militarism, why not give the people a

chance to decide? Those in power knew that they could not put the people to a test; they were afraid to put the America people to a test, and that is why they imposed war upon them, and barely six weeks later imposed conscription upon them. Therefore, I as an Anarchist who became an American out of choice protest. You patriots, you born Americans, you became Americans because you had to. You were dropped on this earth. I had no choice whatever, but I came to America out of my free will, and I, as an American out of choice, say that if you force people into militarism, if you force our young men into the Army, please have the decency to say that you will Prussianize America in order to democratize Germany. (Tremendous applause). You must realize that you will be making a laughing stock out of yourselves. Nobody believes you. Don't you suppose that the fact that you are breaking up meetings and causing disturbances and locking up boys and girls and disturbing and harming people, don't you suppose those things are known abroad? How much the Russian peasants and the workingmen must enjoy themselves when they hear of this wonderful democracy in the United States.

I understand, friends, that a meeting of Russian soldiers was stopped in this city tonight. I am glad of it. The Russian soldiers will go back to the Council of Workmen and Soldiers and they will tell them that when America says she is fighting for democracy she is telling the world a lie. She is not fighting for democracy. I say that those who sit in a glass house have no right to throw stones about them. Now, friends, I am here frankly and openly telling you that I will continue to work against Conscription. We are told that you have stenographers here to take down what we say, this is not the first time we are having stenographers at our meeting. And I have always said things that everybody can hear, and what is more important

I want the police and the soldiers to hear what I have to say. It will do them good. They need education. Now, friends, if I do not tell you tonight not to register, it is not because I am afraid of the soldiers, or because I am afraid of the police. I have only one life to give, and if my life is to be given for an ideal, for the liberation of the people, soldiers, help yourselves. My friends, the only reason that prevents me telling you men of conscriptable age not to register is because I am an Anarchist, and I do not believe in force morally or otherwise to induce you to do anything that is against your conscience, and that is why I tell you to use your own judgment and rely upon your own conscience. It is the best guide in all the world. If that is a crime, if that is treason, I am willing to be shot. It is a wonderful death to die for your ideal, but I impress it upon the minds of patriots present, I impress it upon the minds of the police present, upon the minds of the soldiers present, that for every idealist they kill thousands will rise and they will not cease to rise until the same thing happens in America that has happened in Russia. Don't you know, friends, that there was a time when Russian soldiers locked up every idealist and sent them to Siberia and to underground prisons and suppressed free speech and assembly and tortured them to death. Yet today the whole civilized world, including the United States Government, is trembling in its boots before The Council of Workmen and Soldiers who are standing for liberty. And, friends, young men, soldiers, I am not afraid. I am not afraid for all you can do is to take my life—you can never take my ideals. Neither the police nor the soldiers, nor the United States Government nor all the powers on earth will take my ideals. My ideals will live long after I am dead.

Now, friends, I come to something else far remote from what I have to say tonight, and which is unfortunately always my luck. The newspapers

were good enough to say that all of our meetings are paid for by the German Kaiser. Of course, they know better. They know that if the German Kaiser paid for this meeting, we could have the largest hall in town and invite the police. They know perfectly well that we are not paid by the German Kaiser. No, friends, you workingmen and working women, who are here tonight, you have to pay for tonight's meeting, not the German Kaiser. I am going to appeal to you,—because this meeting has to be paid for by your money, and in the second place, to demonstrate to the gentlemen of the press, present here tonight, to the soldiers and to the police, and to the detectives, that the money which you are going to give is hard earned American pennies, the amount of money your masters are good enough to give you in return for the amount of wealth which you are producing every day. And so, friends, I appeal to you tonight to give liberally, to give as much as you can, when the collectors go through to pay the expense of the meeting. We are very fortunate that we don't have to pay for our protection. We get that perfectly free. We are very grateful that the soldiers are present tonight. It is the only time in our life and their lives that they have heard the truth, and I am glad they are here, and so friends, when the collectors pass, please give as generously and as liberally as you can, and give only if you are opposed to war, and if you are opposed to militarism and conscription. I shall then have a word or two to say after the collection is over.

Meanwhile I call the attention of you soldiers to the fact that if you wish to demonstrate that you believe in American Institutions you will behave yourselves like gentlemen, not like ruffians. (There was considerable confusion throughout the hall and up in the gallery.) Now, after the collection, I shall have a few closing remarks to make, and I am going to stand here until you are through with the

collection. (Some one asked for three cheers for Emma Goldman, and the response was tremendous. Cheers and applause, mingled with boos and also some cheers for Alexander Berkman.) Friends, don't please make a mistake. Don't shout hurrah for Emma Goldman or Alexander Berkman, because they are mere incidents in the history of the world. It is better to shout hurrah for the principles of liberty. That is better than one Alexander Berkman or one Emma Goldman, or one hundred thousand Alexander Berkmans and Emma Goldmans. They will go, but the principle of freedom, the principle of self possession, the principle of self emancipation, the principle of social revolution will live.

Friends, the collectors can go on quietly and continue their work. (There was great confusion throughout the hall at the time and Miss Goldman quieted the audience. Every one became quiet again.) Don't forget friends, that the opposition to conscription only begins, it does not end tonight. Do not forget, also, that the work for Peace, for International Peace only begins. I know, friends, who are here tonight, that you will be glad to learn from the note just sent up that fully twenty thousand people are outside of the hall. Dear Friends, I congratulate the press of New York. The press of New York. The newspapers of New York have rendered our Anti Conscription work more service than a thousand Emma Goldmans could render. Of course, the press did not desire to have twenty thousand people at such a meeting. What the press wanted was merely to paralyze you into silence, to make you believe that you are going to be imprisoned for this and be shot on the spot. It is too bad that America cannot hang you and quarter you and shoot you all at once, for the press would be in favor of that. These blood curdling articles that appear are only for the purpose of paralyzing you. They don't know, the poor chaps, that if anyone

has an idea you can't terrorize him no matter what you do. So I am personally grateful to you—to the press. I am grateful to the police for having sent out so numerous an army, grateful to the young soldiers who really mean no harm. The are innocent boys. They have never yet faced danger. They think it is going to be a picnic; they think they are going to enjoy themselves, poor young gentlemen. I wish you could go to war and have a picnic. I wish you could enjoy yourselves, and I wish you could carry on your war as if it were a frolic, or as if it were a baseball or football game, but you are mistaken, as war means an entirely different thing. We know that war means the annihilation of every fundamental principle of liberty. We know that centralized militarism means nothing else but the carnal brutality of men, blood-shed and conquest in its most abominable aspect. We tonight of the Anti Conscription League raise our voices to the very sky to tell you that you may fight your battles, if you believe in the trenches, but you are representing a losing cause. You represent the past and we represent the future. The Conscription Law has been the means of awakening the people of America. Before the Conscription Law was passed the American people used to think, why, we have freedom, we can do whatever we please, we can go to war if we want to and stay away if we don't want to. My friends, we are grateful to the Government for having passed the Conscription Bill for it will teach the American people that American Liberty has been buried and is dead and is a corpse, and that only our voice is going to raise it up and revive it again, until the American people and all the people living in America will unite in one great mass and will throw out capitalism and Government by militarism.

It was our intention to have a number of other speakers here tonight. They are all here. I don't want you to think for a moment that anyone backed

out, but we are not going to give the satisfaction to the patriots to break up this meeting. Therefore, friends, I want you to close this meeting with the singing of the International and to go out quietly. Your friends on the outside are waiting, and you will all raise one mighty voice that is going to drown militarism and government and capitalism. (At the close of the meeting an old lady was helped to the platform by some one on the platform and distributed some papers, taken from an envelope. The pamphlets were afterward taken up by the soldiers and the old lady was arrested.)

MEETING CLOSED.

Government's Exhibit 34.

This is a copy of the June, 1917, issue of *Mother Earth* similar to Government's Exhibit 25, with the following written on the back cover:

"Identified by Emma Goldman as her publication June 15, 1917. G. D. Barnitz."

Government's Exhibit 35.

(Letterhead of No-Conscription League.)

June 8, 1917.

Mr. H. A. Content
U. S. Assistant District Attorney
Post Office Bldg.
New York City.

Dear Sir:—

We understand that Morris Becker and Louis Kramer are held on the charge of distributing handbills announcing the No-Conscription Massmeeting of June 4th. We do not know whether the men

mentioned actually gave out the handbills or not, but even supposing that they did, we consider their arrest and prosecution an unmitigated outrage, in view of the fact that the authorities permitted the meeting to take place and that it was attended by yourself and staff, and that you took no action either to stop the meeting or to arrest the speakers for anything said there. In other words, from your own point of view the gathering must have been a perfectly legal affair. Otherwise you were in duty bound to take measures to prevent or stop the same.

Considering these facts, it is nothing short of preposterous to prosecute any one for the distribution of handbills announcing a perfectly legal meeting.

The real reason for the prosecution, therefore, seems to be the fact that the two boys in question have declared themselves to be Anarchists and members of the NO-CONSCRIPTION LEAGUE. In other words, they are being prosecuted for holding certain social and political opinions. Since when, may we ask, is the mere holding of an opinion a crime in these free United States?

Anarchism stands for individual liberty and social wellbeing. It is opposed to personal invasion as well as to the organized form of violence known as government. If the belief in Anarchism or the holding of the opinions represented by the NO-CONSCRIPTION LEAGUE (the principles of which you will find clearly stated on our letter-head) is a crime, then why are only unknown boys like Kramer and Becker prosecuted and not the more prominent men and women guilty of a similar "crime"? We hereby state in the most emphatic manner that we, the undersigned, are Anarchists and firm believers in the principles enunciated by the NO-CONSCRIPTION LEAGUE.

If the spirit of justice and fair play is the least factor in your activities as federal prosecutor, then we call upon you for the immediate release of Beck-

er and Kramer and the others charged with the "crime" of holding unpopular political and social opinions.

Yours for the day when there shall be justice, liberty and true democracy in America.

ALEXANDER BERKMAN
EMMA GOLDMAN
(On back)

June 15-17.

This paper was shown by me to Emma Goldman and Alex. Berkman at 20 East 125 St. and both identified it as having been the one they sent to Mr. Content and both admitted that they were responsible for what was in the letter.

GEO. D. BARNITZ.

Government's Exhibit 35-A.

No-Conscription League
20 East 125th Street
New York

Postmarked
New York, N.Y.
Jun 9 7 AM
1917 Sta. D

Canceled
Stamp

MR. H. A. CONTENT
U. S. Assistant District Attorney
Post Office Bldg.
New York City

Government's Exhibit 36.

This is a copy of the June, 1917, issue of *The Blast* similar to Government's Exhibit 26, with the following written on it:

"Identified by Alexander Berkman as his publication June 15, 1917. G. D. Barnitz."

Government's Exhibit 37.

Large bundle containing magazines similar to Government's Exhibit 25.

Government's Exhibit 38.

Bundle containing form letters similar to Government's Exhibits 4, 5 and 6.

Government's Exhibit 39.

Bundle of addressed envelopes with enclosures similar to Government's Exhibits 7-A, 7-B and 7-C, some signed by Emma Goldman and others by Alexander Berkman.

Government's Exhibit 41.

Bundle containing copies of *The Blast* similar to Government's Exhibit 26.

Government's Exhibit 43.

LABOR AND WAR

WORKERS, MEN AND WOMEN! The State Military Census is a trap to catch you in the bloody noose of militarism. The State Registration is to force men and women, aye, children 16 years of age, to become cogs in the machine of human slaughter.

The boys over 18 years of age, and the men till the age of 45, will automatically become members of the State Militia. They will be drafted into the National Guard, to be called to war or to do the dirty work of the bosses in time of strikes.

Men, if you have a spark of self-respect in your hearts, will you become the murderers of your brothers? Will you be enrolled in the Militia, the Militia whose hands are dripping with the blood of strikers who had asked for better conditions of living?

Men, will you let the bosses drive you to slaughter? Women, will you help save your husbands, brothers and sons? The State Military Census will turn the gun of son against father, of brother against brother. Workers in military uniform will be forced to shoot down their fellow workers when they go out on strike. Your unions will be broken up, and the bosses will have a free hand with you, to do as they please. They will make you work long hours for pitiful starvation wages, under the excuse of military necessity. All the advantages that you have gained by long years of hard struggle will be swept away over night and you will not be able to protest or to resist, because the State Military Census enrolls every man in the militia, and you will find yourself under martial law if you dare to object to the oppression of the masters.

Now is the time to protest. Later it will be too late. If hundreds of thousands of you raise your voice NOW, you will force the government to listen to you, and they will know that you have the courage of manhood and womanhood, and that you cannot be treated as the Czar used to treat his submissive subjects. The people of Russia, your own brothers and sisters, brought the mighty Czar off his high throne. Are you going to submit to Czarism in America?

Brothers, Sisters, Men and Women, come to the great

DEMONSTRATION

MADISON SQUARE
23rd Street and Madison Avenue
Saturday, June 23rd, 2 P. M.

Speakers in all Languages

Among them Emma Goldman; Alexander Berkman; Leonard D. Abbott; Louis C. Fraina; Alex Cohen; L. Baury; Pietro Allegra and others.

Auspices
Friends of American Freedom

Men who have not registered on June 5th should stay away

Government's Exhibit 45.

This is a carbon copy of Government's Exhibit 45-A.

Government's Exhibit 45-A.

Great Open Air
DEMONSTRATION
To Discuss
STATE MILITARY CENSUS
Madison Square
23d St. and Madison Ave.
Saturday, June 16, 2 P. M

Speakers:

Emma Goldman
Alexander Berkman
Leonard D. Abbott
Alex Cohen
Pietro Allegra
S. Barnard and others

Auspices Friends of American Freedom
Young men who did not register June 5th should stay away

Government's Exhibit 49.

This is a bundle of copies of *Mother Earth* (Government's Exhibit 25).

Government's Exhibit 50.

This is a bundle of form letters similar to Government's Exhibits 4, 5 and 6.

Government's Exhibit 51.

This is a bundle of subscription blanks similar to Government's Exhibit 8-C.

Government's Exhibit 52.

This is a bundle of hand bills similar to Government's Exhibit 43.

Government's Exhibit 53.

This is a bundle containing copies of Government's Exhibit 1.

Government's Exhibit 55.

Issue of *Mother Earth,* Vol. IX, July, 1914, No. 5. On the cover appears a cut of a monument on which is written "Killed July 4, 1914, Caron, Hanson, Berg."

On the inside of cover appears the following:

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EMMA GOLDMAN - - - - - Publisher
ALEXANDER BERKMAN - - - - Editor

Office: 74 West 119th Street, New York City

Telephone, Harlem 6194

Price 10 Cents per Copy One Dollar per Year

The following are the material extracts from the issue:

ALEXANDER BERKMAN'S OPENING ADDRESS.

Comrades, Friends and Sympathizers: We have come here this afternoon, not to mourn any calamity, but to pay our homage to three comrades whom we consider martyrs to the cause of humanity. This is not an occasion for mourning. Indeed, quite the contrary is perhaps the case, because our comrades may have proved—for all we know—that there are still men in the labor movement who will not stand quietly by when they themselves or other workers are persecuted, oppressed and maltreated. We hold that our Comrades Arthur Caron, Charles Berg and Carl Hanson died either martyrs to the cause of labor, or victims of the capitalist class.

What were the circumstances under which our three comrades met their tragic deaths? Two possibilities there are. One of them is that our friends were directly murdered by the enemy, perhaps by agents of the Rockefellers. I should not in the least be surprised if that is so, because the Rocke-

fellers have committed many murders; they would not stop at anything to add a few more coldblooded crimes to the long list of which they are guilty. And if our comrades have died as a result of the hatred of the capitalist class, then I say that they were indeed martyrs to the cause of labor, for they were murdered because of their loyalty, their devotion and effective work in behalf of the working class of this country.

There is another possibility, and that is that our friends had themselves prepared the infernal machine, bomb, or whatever it was. And, of course, if that is the case, then I am quite sure that they did so with the intention of using it upon the enemy. The facts so far do not prove either the one supposition or the other; but if the latter be correct, then their death as a result of a perhaps premature explosion lies at the door of that iniquitous social system of capitalism which had brought our comrades to the point where persecution, tyranny and oppression drove them to the climax of resisting by the might of dynamite. If society has forced our friends to resist oppression with violence, then capitalist society is guilty of creating the spirit which can find expression only in such violent methods. Therefore, whatever the actual facts, our comrades are either victims of capitalism or they are martyrs to the cause of labor and of humanity in general.

I want to go on record here to-day as saying that I prefer to believe that our comrades were not victims, in the sense of having been killed as the result of a conspiracy of the enemy. I want to go on record as saying that I hope our comrades had themselves prepared the bomb, intending to use it upon the enemy. Why do I say this? Because I believe, and firmly believe, that the oppression of labor in this country, the persecution of the radical elements especially, has reached a point where nothing but determined resistance will do any good

And I believe with all my heart in resistance to tyranny on every and all occasions. It was a great American who said that the tree of liberty must be watered now and then by the blood of tyrants. That holds good to-day as it did a hundred years ago. When workers are shot down for demanding better conditions of living, when their women and children are slaughtered and burned alive, then I say that it is time for labor to quit talking and to begin to act.

My sentiments in regard to labor at large and the methods that the workers must pursue to achieve final emancipation, apply also to the occasions of everyday life. Pertaining to this particular occasion, I want to say that since the authorities have suppressed our funeral procession, by which we intended in a dignified manner to pay honor to our dead, the question naturally arises why we did not resist that suppression, why we did not parade in spite of the prohibition of the authorities. I am going to tell you why, and I want to be quite frank with you and speak to you from my heart as man to man. I am going to say on this public platform just what I would say in private. And that is this: as soon as we are ready to resist oppression and invasion on the part of the police, just so soon we will do it. If we don't resist them with our full might on this occasion it is because, first, we consider this monster memorial demonstration far more important than any funeral procession, and secondly, because we don't intend to do the things which the police expect us to do or when they expect us to do them. We are always ready to stand up for our principles and ideas, to fight for them to the very limit of our possibilities, and to pay with our lives, if necessary, in order to assert the rights of the individual and the rights of the working class of this country. If we have abandoned the procession, it was only because we yielded, for the present, to

superior physical force on the part of the enemy. But we do not mean to yield all the time.

We hold that labor in this country has been degraded to the point where the average workingman is a mere wage-slave, with no rights and no opportunities, and that his only chance of defending himself against the aggression of his exploiters and against the tyranny of the State and National governments lies in his determination to fight, in his consciousness of his economic strength, and in his power to organize a tremendous movement whose slogan will be direct action, with its final purpose, the general strike. And while we are advancing toward this most desired culmination, while we are approaching the Social Revolution, there will always be individuals, more intelligent, more determined and daring than the rest, eager to pave the way by acts of individual devotion and sacrifice. Therefore I say that there is that second possibility, that our Comrades Arthur Caron, Charles Berg and Carl Hanson were such devoted and brave individuals out of the large mass who were determined to show an example to labor by resisting to the full extent of their ability the exploitation, the oppression and the persecution of the capitalist class. As such I acclaim them the conscious, brave and determined spokesmen of the working class, and I call upon you, friends and fellow-workers, for three cheers for our dead comrades.

* * * * * *

EMMA GOLDMAN'S TELEGRAM.

During the course of the afternoon a telegram was received from San Francisco from Emma Goldman and Ben Reitman. It read as follows:

> "Our deepest sympathy with all oppressed of the world, of whom our dead comrades were the conscious and brave spokesmen. We honor the memory of our dead comrades, the victims

of the capitalist system and the martyrs of labor."

EMMA GOLDMAN,
DR. BEN REITMAN.

* * * * * *

A GAUGE OF CHANGE.

By Alexander Berkman.

Not since the Haymarket affair of 1886 has any Anarchist event aroused this country as did the Lexington explosion.

The Haymarket bomb was followed by a terrible wave of the mob spirit; no Anarchist was safe from the blind fury of the murderous law-and-order hordes, in and out of uniform.

What a difference after the Lexington Avenue explosion! The Anarchists boldly hail the victims of the tragedy as comrades and martyrs, and an audience of twenty thousand pays respect to our dead and applauds our utterances.

Nor does it make any difference in what manner Comrades Caron, Berg and Hanson met their tragic death, or what the true explanation of the explosion in their flat. I have publicly said in Union Square that I hoped that our comrades were not the victims of the enemy's conspiracy, but that they had planned to employ dynamite either in revenge for wrongs suffered or in the defense of the rights of themselves and their fellow-workers, of labor at large. And the monster mass-meeting enthusiastically echoed my expressed hope.

What a wonderful change in public sentiment!

Do you still ask me what the Anarchists have accomplished in the last quarter of a century? Just this: They have taught the people that violence is justified, aye, necessary in the defensive and offensive struggle of labor against capital. They have freed the public mind, to a remarkable extent, from the superstition of bourgeois morality, as is

evident from the Union Square demonstration and from the numerous expressions of sympathy and encouragement we are receiving from heretofore indifferent if not unsympathetic sources. They have taught the country that there is a class war, a war to the knife between labor and capital, and that all and every means are justified in the defense and offense of labor against its Ludlow masters. Nay, more; they forced the beast of law to draw back its claws at the sight of the bold frankness and determined attitude of its intended prey. The enemy has been taught to respect the power of our ideal backed by the willingness and determination to fight—to fight to the death, if need be, with the minority weapon more effective in the hands of an individual than is a whole company of hired thugs.

Never before have we witnessed in this country a similar situation. Times have indeed changed! Let us be frank about it. The struggle of labor against capital, the war of the new against the old, will terminate quicker, more humanely in the long run, by facing the issue squarely. Power, strength —that alone counts in this war. The power of the economic solidarity of labor will ultimately knock the last master off the back of the last slave, and meanwhile—while labor gathers this power, its success will be hastened, its courage strengthened by tempering oppression with dynamite.

Government's Exhibit 56.

A wooden box and three suit cases containing copies of the June issue of *Mother Earth*, a copy of which is Exhibit 25, all in wrappers ready for mailing.

Government's Exhibit 57.

A specimen of Emma Goldman's handwriting.

Government's Exhibit 61.

Stenographic notes, taken by Caddell, of a speech by Emma Goldman, at Harlem River Casino, on May 18, 1917.

Government's Exhibit 62.

Transcript of Exhibit 61 which is similar to Exhibit 31 with the exception of the insertion of a few proper names omitted in Exhibit 31.

Defendants' Exhibit A.

Cancelled check of James Hollbeck for $3,000, read into record.

Defendants' Exhibit B.

PREPAREDNESS: THE ROAD TO UNIVERSAL SLAUGHTER.

With the cunning methods used by the scheming diplomats and military cliques of Germany to saddle the masses with Prussian militarism, the American military ring with its Roosevelts, its Garrisons, its Daniels, and lastly its Wilsons, are moving the very heavens to place the militaristic heel upon the necks of the American people, and, if suc-

cessful, will hurl America into the storm of blood and tears now devastating the countries of Europe.

Forty years ago Germany proclaimed the slogan: "Germany above everything. Germany for the Germans, first, last and always. We want peace; therefore we must prepare for war. Only a well arrmed and thoroughly prepared nation can maintain peace, can command respect, can be sure of its national integrity." And Germany began to prepare, thereby forcing the other nations to do the same. The terrible European war is only the culminating fruition of the hydra-headed gospel—military preparedness.

Since the war began, miles of paper and oceans of ink have been used to prove the barbarity, the cruelty, the oppression of Prussian militarism. Conservatives and radicals alike are giving their support to the Allies for no other reason than to help crush that militarism, in the presence of which, they say, there can be no peace or progress in Europe. But though America grows fat on the manufacture of munitions and war loans to the Allies to help crush Prussianism, the same cry is now being raised in America which, if carried into national action, would build up an American militarism far more terrible than German or Prussian militarism could ever be, and that because nowhere in the world has capitalism become so brazen in its greed and nowhere is the State so ready to kneel at the feet of capital.

The very proclaimers of "America first" have long before this betrayed the fundamental principles of real Americanism, of the kind of Americanism that Jefferson had in mind when he said that the best government is that which governs least; the kind of Americanism that David Thoreau worked for when he proclaimed that the best government is the one that doesn't govern at all; or the other truly great Americans who aimed to make of this country a haven or refuge, who hoped

that all the disinherited and oppressed people in coming to these shores would give character, quality and meaning to the country. That is not the America of the polictictian and munition speculators. Their America is powerfully portrayed in the idea of a young New York sculptor I know: a hard cruel hand with long, lean merciless fingers crushing in over the heart of the immigrant, squeezing out its blood in order to coin dollars and give the foreigner blighted hopes and stulted aspirations instead.

No doubt Woodrow Wilson has reason to defend these institutions. But what an idea to hold out to the young generation! How is a military drilled and trained people to defend freedom, peace and happiness? This is what Major General O'Ryan has to say of an efficiently trained generation: "The soldier must be so trained that he becomes a mere automaton; he must be so trained that it will destroy his initiative; he must be so trained that he is turned into a machine. The soldier must be forced into the military noose; he must be jacked up; he must be ruled by his superiors with pistol in hand."

This was not said by a Prussian Junker; not by a German barbarian; not by Treitschke or Bernhardi, but by an American Major General. And he is right. You cannot conduct war with equals; you cannot have militarism with free born men; you must have slaves, automatons, machines, obedient disciplined creatures, who will move, act, shoot and kill at the command of their superiors. That is preparedness, and nothing else.

I am not more Pro-German than pro-Ally. As an Anarchist I refute both, as the "two thieves who are too cowardly to fight." Hence they force the people to do their criminal deed, hence they sacrifice "the boys from every village, hamlet and town."

That which has driven the masses of Europe into the trenches and to the battlefields is not their inner

longing for war; it must be traced to the cut-throat competition for military equipment, for more efficient armies, for larger warships, for more powerful cannon. You cannot build up a standing army and then throw it back into a box like tin soldiers. Armies equipped to the teeth with weapons, with highly developed instruments of murder and backed by the military interests, have their own dynamic functions. We have but to examine into the nature of militarism to realize the truism of this contention.

Miltarism consumes the strongest and most productive elements of each nation. Militarism swallows the lagest part of the national revenue. Almost nothing is spent on education, art, literature and science, compared with the amount devoted to militarism in times of peace, while in times of war everything else is set at naught; all life stagnates, all effort is curtailed; the very sweat and blood of the masses are used to feed this insatiable monster — militarism. Under such circumstances, it must become more arrogant, more aggressive, more bloated with its own importance. If for no other reason, it is out of surplus energy that militarism must act to remain alive; therefore it will seek an enemy or create one artifically. In this civilized purpose and method, militarism is sustained by the State, protected by the laws of the land, is fostered by the home and the school, and glorified by public opinion. In other words, the function of militarism is to kill. It cannot live except through murder.

But the most dominant factor of military preparedness and the one which inevitably leads to war, is the creation of group interests, which consciously and deliberately work for the increase of armament whose purposes are furthered by creating the war hysteria. This group interest embraces all those engaged in the manufacture and sale of munition and in military equipment for personal gain and profit. The family Krupp, for in-

stance, which owns the largest cannon munition plant in the world; its sinister influence in Germany, and in fact in many other countries, extends to the press, the school, the church and to statesmen of highest rank. Shortly before the war, Carl Liebknecht, one of the few brave public men in Germany now, brought to the attention of the Reichstag that the family Krupp had in its employ officials of the highest military position, not only in Germany, but in France and in other countries. Everywhere its emissaries have been at work, systematically inciting national hatred and antagonisms; creating invasion hysteria.

It is not at all unlikely that the history of the present war will trace its origin to the same international murder trust. But is it always necessary for one generation to wade through oceans of blood and heap up mountains of human sacrifice that the next generation may learn a grain of truth from it all? Can we of to-day not profit by the cause which led to the European war, can we not learn that it was preparedness, thorough and efficient preparedness on the part of Germany and the other countries for military aggrandizement and material gain; above all can we not realize that preparedness in America must and will lead to the same result, the same barbarity, the same senseless sacrifice of life? Is America to follow suit, is it to be turned over to the American Krupps, the American military cliques? It almost seems so when one hears the jingo howls of the press, the blood and thunder tirades of the bully Roosevelt, the sentimental twaddle of our college-bred President.

The more reason for those who still have a spark of libertarianism and humanity left to cry out against this great crime, against the outrage now being prepared and imposed upon the American people. It is not enough to claim being neutral; a neutrality which sheds crocodile tears with one eye and keeps the other riveted upon the profits from

war supplies and war loans, is not neutrality. It is a hypocritical cloak to cover the country's crimes. Nor is it enough to join the bourgeois pacifists who proclaim peace among the nations while helping to perpetuate the war among the classes, a war which, in reality, is at the bottom of all other wars.

It is this war of the classes that we must concentrate upon, and in that connection the war against false values, against evil institutions, against all social atrocities. Those who appreciate the urgent need of co-operating in great struggles must oppose military preparedness imposed by the State and capitalism for the destruction of the masses. They must organize the preparedness of the masses for the overthrow of both capitalism and the State Industrial and economic preparedness is what the workers need. That alone leads to revolution at the bottom as against mass destruction from on top. That alone leads to true internationalism of labor against Kaiserdom, Kingdom, diplomacies, military cliques and bureaucracy. That alone will give the people the means to take their children out of the slums, out of the sweat shops and the cotton miles. That alone will enable them to inculcate in the coming generation a new ideal of brotherhood, to rear them in play and song and beauty; to bring up men and women, not automatons. That alone will enable woman to become the real mother of the race, who will give to the world creative men, and not soldiers who destroy. That alone leads to economic and social freedom, and does away with all wars, all crimes, and all injustice.

Defendants' Exhibit B-A.

THE PSYCHOLOGY OF POLITICAL VIOLENCE.

Bjornstjerne Bjornson, in the second part of *Beyond Human Power*, emphasizes the fact that it is among the Anarchists that we must look for the modern martyrs who pay for their faith with their blood, and who welcome death with a smile, because they believe, as truly as Christ did, that their martyrdom will redeem humanity.

"There is a truism that the man in the street seems always to forget, when he is abusing the Anarchists, or whatever party happens to be his *bete noire* for the moment, as the cause of some outrage just perpetrated. This indisputable fact is that homicidal outrages have, from time immemorial, been the reply of goaded and desperate classes, and goaded and desperate individuals, to wrongs from their fellow-men, which they felt to be intolerable. Such acts are the violent recoil from violence, whether aggressive or repressive; they are the last desperate struggle of outraged and exasperated human nature for breathing space and life. And their cause lies not in any special conviction, but in the depths of that human nature itself. The whole course of history, political and social, is strewn with evidence of this fact. To go no further, take the three most notorious examples of political parties goaded into violence during the last fifty years: the Mazzinians in Italy, the Fenians in Ireland, and the Terrorists in Russia. Were these people Anarchists? No. Did they all three even hold the same political opinions? No. The Mazzinians were Republicans, the Fenians political separatists, the Russians Social Democrats or Constitutionalists. But all were driven by desperate circumstances into this terrible form of revolt. And when we turn from parties to individuals who have acted in like manner, we stand appalled by the number of human beings goaded

and driven by sheer desperation into conduct obviously violently opposed to their social instincts.

Now that Anarchism has become a living force in society, such deeds have been sometimes committed by Anarchists, as well as by others. For no new faith, even the most essentially peaceable and humane the mind of man has yet accepted, but at its first coming has brought upon earth not peace, but a sword; not because of anything violent or anti-social in the doctrine itself; simply because of the ferment any new and creative idea excites in men's minds, whether they accept or reject it. And a conception of Anarchism, which, on one hand, threatens every vested interest, and, on the other, holds out a vision of a free and noble life to be won by a struggle against existing wrongs, is certain to rouse the fiercest opposition, and bring the whole repressive force of ancient evil into violent contact with the tumultuous outburst of a new hope.

Under miserable conditions of life, any vision of the possibility of better things makes the present misery more intolerable, and spurs those who suffer to the most energetic struggles to improve their lot, and if these struggles only immediately result in sharper misery, the outcome is sheer desperation. In our present society, for instance, an exploited wage worker, who catches a glimpse of what work and life might and ought to be, finds the toilsome routine and the squalor of his existence almost intolerable; and even when he has the resolution and courage to continue steadily working his best, and waiting until new ideas have so permeated society as to pave the way for better times, the mere fact that he has such ideas and tries to spread them, brings him into difficulties with his employers. How many thousands of Socialists, and above all Anarchists, have lost work and even the chance of work, solely on the ground of their opinions? It is only the specially gifted craftsman, who, if he be

a zealous propagandist, can hope to retain permanent employment. And what happens to a man with his brain working actively with a ferment of new ideas, with a vision before his eyes of a new hope dawning for toiling and agonizing men, with the knowledge that his suffering and that of his fellows in misery is not caused by the cruelty of fate, but by the injustice of other human beings—what happens to such a man when he sees those dear to him starving, when he himself is starved? Some natures in such a plight, and those by no means the least social or the least sensitive, will become violent, and will even feel that their violence is social and not anti-social, that in striking when and how they can, they are striking, not for themselves, but for human nature, outraged and despoiled in their persons and in those of their fellow sufferers. And are we, who ourselves are not in this horrible predicament, to stand by and coldly condemn these piteous victims of the Furies and Fates? Are we to decry as miscreants these human beings who act with heroic self-devotion, sacrificing their lives in protest, where less social and less energetic natures would lie down and grovel in abject submission to injustice and wrong? Are we to join the ignorant and brutal outcry which stigmatizes such men as monsters of wickedness, gratuitously running amuck in a harmonious and innocently peaceful society? No! We hate murder with a hatred that may seem absurdly exaggerated to apologists for Matabele massacres, to callous acquiescers in hangings and bombardments, but we decline in such cases of homicide, or attempted homicide, as those of which we are treating, to be guilty of the cruel injustice of flinging the whole responsibility of the deed upon the immediate perpetrator. The guilt of these homicides lies upon every man and woman who, intentionally or by cold indifference, helps to keep up social conditions that drive human beings to despair. The man who

flings his whole life into the attempt at the cost of his own life, to protest against the wrongs of his fellow-men, is a saint compared to the active and passive upholders of cruelty and injustice, even if his protest destroy other lives besides his own. Let him who is without sin in society cast the first stone at such a one."

That every act of political violence should nowadays be attributed to Anarchists is not at all surprising. Yet it is a fact known to almost everyone familiar with the Anarchist movement that a great number of acts, for which Anarchists had to suffer, either originated with the capitalist press or were instigated, if not directly perpetrated, by the police.

For a number of years acts of violence had been committed in Spain, for which the Anarchists were held responsible, hounded like wild beasts, and thrown into prison. Later it was disclosed that the perpetrators of these acts were not Anarchists, but members of the police department. The scandal became so widespread that the conservative Spanish papers demanded the apprehension and punishment of the gang-leader, Juan Rull, who was subsequently condemned to death and executed. The sensational evidence, brought to light during the trial, forced Police Inspector Momento to exonerate completely the Anarchists from any connection with the acts committed during a long period. This resulted in the dismissal of a number of police officials, among them Inspector Tressols, who, in revenge, disclosed the fact that behind the gang of police bomb-throwers were others of far higher position, who provided them with funds and protected them.

"Repression, tyranny, and indiscriminate punishment of innocent men have been the watchwords of the government of the alien domination in India ever since we began the commercial boycott of English goods. The tiger qualities of the British are

much in evidence now in India. They think that by the strength of the sword they will keep down India! It is this arrogance that has brought about the bomb, and the more they tyrannize over a helpless and unarmed people, the more terrorism will grow. We may deprecate terrorism as outlandish and foreign to our culture, but it is inevitable as long as this tyranny continues, for it is not the terrorists that are to be blamed, but the tyrants who are responsible for it. It is the only resource for a helpless and unarmed people when brought to the verge of despair. It is never criminal on their part. The crime lies with the tyrant."

Even conservative scientists are beginning to realize that heredity is not the sole factor moulding human character. Climate, food, occupation; nay, color, light, and sound must be considered in the study of human psychology.

If that be true, how much more correct is the contention that great social abuses will and must influence different minds and temperaments in a different way. And how utterly fallacious the stereotyped notion that the teachings of Anarchism, or certain exponents of these teachings, are responsible for the acts of political violence.

Anarchism, more than any other social theory, values human life above things. All Anarchists agree with Tolstoy in this fundamental truth: if the production of any commodity necessitates the sacrifice of human life, society should do without that commodity, but it cannot do without that life. That, however, nowise indicates that Anarchism teaches submission. How can it, when it knows that all suffering, all misery, all ills, result from the evil of submission?

Has not some American ancestor said, many years ago, that resistance to tyranny is obedience to God? And he was not an Anarchist even. I would say that resistance to tyranny is man's highest ideal. So long as tyranny exists, in what-

ever form, man's deepest aspiration must resist it as inevitably as man must breathe.

Compared with the wholesale violence of capital and government, political acts of violence are but a drop in the ocean. That so few resist is the strongest proof how terrible must be the conflict between their souls and unbearable social iniquities.

High strung, like a violin, they weep and moan for life, so relentless, so cruel, so terribly inhuman. In a desperate moment the string breaks. Untuned ears hear nothing but discord. But those who feel the agonized cry understand its harmony; they hear in it the fulfilment of the most compelling moment of human nature.

Such is the psychology of political violence.

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Defendants' Exhibit B-C.

A NEW DECLARATION OF INDEPENDENCE.

(*Mother Earth,* Vol. IV., 1909-10.)

When, in the course of human development, existing institutions prove inadequate to the needs of man, when they serve merely to enslave, rob, and oppress mankind, the people have the eternal right to rebel against, and overthrow, these institutions.

The mere fact that these forces—inimical to life, liberty, and the pursuit of happiness—are legalized by statute laws, sanctified by divine rights, and enforced by political power, in no way justifies their continued existence.

We hold these truths to be self-evident: that all human beings, irrespective of race, color, or sex, are born with the equal right to share at the table of life; that to secure this right there must be established among men economic, social, and political freedom; we hold further that government exists

but to maintain special privilege and property rights; that it coerces man into submission and therefore robs him of dignity, self-respect, and life.

The history of the American kings of capital and authority is the history of repeated crimes, injustices, oppression, outrage, and abuse, all aiming at the suppression of individual liberties and the exploitation of the people. A vast country, rich enough to supply all her children with all possible comforts, and insure well-being to all, is in the hands of a few, while the nameless millions are at the mercy of ruthless wealth gatherers, unscrupulous lawmakers, and corrupt politicians. Sturdy sons of America are forced to tramp the country in a fruitless search for bread, and many of her daughters are driven into the street, while thousands of tender children are daily sacrificed on the altar of Mammon. The reign of these kings is holding mankind in slavery, perpetuating poverty and disease, maintaining crime and corruption; it is fettering the spirit of liberty, throttling the voice of justice, and degrading and oppressing humanity. It is engaged in continual war and slaughter, devastating the country and destroying the best and finest qualities of man; it nurtures superstition and ignorance, sows prejudice and strife, and turns the human family into a camp of Ishmaelites.

We, therefore, the liberty-loving men and women, realizing the great injustice and brutality of this state of affairs, earnestly and boldly do hereby declare, That each and every individual is and ought to be free to own himself and to enjoy the full fruit of his labor; that man is absolved from all allegiance to the kings of authority and capital; that he has, by the very fact of his being, free access to the land and all means of production, and entire liberty of disposing of the fruits of his efforts; that each and every individual has the unquestionable and unabridgeable right of free and voluntary association with other equally sovereign individuals

for economic, political, social, and all other purposes, and that to achieve this end man must emancipate himself from the sacredness of property, the respect for man-made-law, the fear of the Church, the cowardice of public opinion, the stupid arrogance of national, racial, religious, and sex superiority, and from the narrow puritanical conception of human life. And for the support of this Declaration, and with a firm reliance on the harmonious blending of man's social and individual tendencies, the lovers of liberty joyfully consecrate their uncompromising devotion, their energy and intelligence, their solidarity and their lives.

Defendants' Exhibit D.

ASPIRATIONS OF THE BLAST.

(*The Blast*, Vol. 1, No. 2.)

The Blast is not a decent, respectable paper. Decency and Respectability—Mother Grundy's bastard twins—change, like the fashions, with age, country and climate, mostly without rhyme or reason.

If you are a sissified mollycoddle of the good old kind that would put draping around a piano leg and go to bed in a night cap, drop this paper right now. It will surely shock you, for the truth is stark naked.

It is said: "The truth shall make you free." So it shall. But the truth is not a nugget found by luck. He who diligently searches will find grains of it now and then.

The Blast preaches no dogma. Its mission is more revolutionary: to arouse independence of feeling, thought and action, without which there is no road to human freedom.

Freedom is primarily a state of mind. It can neither be chained in a dungeon nor heralded from the throne. There is no royal road to it, though the pathways are many. *The Blast* proposes to discuss them.

Any man or movement enlisted in the battle for the right of the worker to the Earth and the fullness thereof will find in *The Blast* a fighting friend, regardless of regimental insignia.

The Blast has no time to split hairs over policies.

If an institution has the elements of slavery within it, we shall grill it, no matter how respectably moss-grown it has become with age.

If *The Blast* can aid in sweeping away the cobwebs of tradition, and call to life the vision of a better, freer world, without oppression and legalized theft, without soldiers and bloodshed, without priests and superstitions, without politicians and graft, plutocrats and paupers, we shall not have worked in vain.

We know our limitations.

We are not profound philosophers. Hence we refuse to be slaves to consistency.

We are not learned scholars. Therefore faulty rhetoric will not freeze the blood in our veins.

We are free from the blight of professional journalism. We shall not worry ourselves to death about style.

We are but workers with a passion for Freedom and with the determination to express it in the face of all difficulty and danger.

If you are with us, *now* is the time to prove your interest and solidarity.

Defendants' Exhibit E.

VIOLENCE AND ANARCHISM.

(*The Blast*, Vol. I, No. 17.)

It is growing rather monotonous to hear the cry of "Anarchist conspiracy" raised whenever and wherever there happens an "unlawful" shot or bomb explosion.

Let us consider the matter dispassionately. Is violence specifically Anarchistic? Is the taking of human life such a very unusual occurrence among "civilized" peoples? Is our whole social existence anything but an uninterrupted series of murder, assassination, mutilation? All our honored institutions are rooted in the very spirit of murder. Do we build warships for educational purposes? Is the army a Sunday school? Our police, jails and penitentiaries—what purpose do they serve but to suppress, kill and maim? Is the gallows the symbol of our brotherhood, the electric chair the proof of our humanitarianism?

"All these things are necessary evils," we are told by the self-satisfied. True, they are necessary; necessary to preserve society *as it is*. But has it ever occurred to the "good citizen" whether it is really necessary to preserve things as they are? Is it indeed worth while?

Organized society can have but one *raison d'etre*; namely, the greatest good of its members. Let us examine, then, whether society, as at present constituted, can be justly said to fulfill its mission.

No life, individual or collective, is possible without the means of subsistence. The social members supplying these means are, consequently, the life-givers of the community. And who are they? The question answers itself automatically: the producers of the country's wealth are the conservators of its life. All members and classes of society should equally benefit by the fact of our combined

effort as a society. But if, for any reason, distinctions are to be made, the producing class, the real backbone of the social body, should have the preference.

In other words, the workers are the ones who should enjoy the greatest benefits arising from social organization. That is the true mission of human society. Does the latter accomplish it? Does it come anywhere near accomplishment?

By no means. The producers are the very ones on whose shoulders rests the whole burden of our social evils. They are the disinherited, the submerged. The products of their toil are the property of someone else; the land and machinery, without which no production is possible, are not owned by them; as a result, they are forced to sell their labor for whatever pittance the employers condescend to give. Hence poverty, starvation, and widespread misery among the very class which, as the sole producer, has the best claim to enjoy the blessings of organized social life.

To support, defend and perpetuate these unjust and terrible conditions it is necessary to have police, prisons, laws and government. For the disinherited are not content to forever starve in the midst of plenty, and the exploited are beginning to cry out against their cruel bondage.

These cries, these signs of rebellious dissatisfaction must be stifled. That is the mission of law and government: to preserve things as they are; to secure to the rich their stolen wealth; to strangle the voice of popular discontent.

Such is the social life of "civilized" countries. A life of misery and degradation, of economic exploitation, governmental suppression, legal brutality and judicial murder. Sham, injustice and tyranny are the synonyms of organized society. Shall we preserve it as it is? It is necessary and desirable? Is it even possible?

"But you can't regenerate society by violence, by a bomb," the well-meaning people argue.

Indeed, full well we known we cannot. Be fair; give ear. Do not confound the philosophy of a better, freer and happier life with an *act resulting from the very evils which that philosophy seeks to abolish.*

Anarchism is the science of social order, as opposed to existing disorder; of brotherhood, as against present Ishmaelitism; of individual liberty and well-being, as opposed to legal oppression, robbery and universal misery.

This condition of social regeneration cannot be achieved by the will or act of any man or party. The enlightenment of the workers regarding the evils of wage slavery, the awakening of the public conscience to a clearer understanding of liberty and justice—these are the forces which will abolish all forms of bondage, political, economical and social, replacing present institutions by free co-operation and the solidarity of communal effort.

"But the bomb?" cry the judges in and out of court. The bomb is the echo of your cannon, trained upon our starving brothers; it is the cry of the murdered striker; 'tis the voice of hungry women and children; the shriek of the maimed and torn in your industrial slaughter houses; it is the dull thud of the policeman's club upon a defenseless head; 'tis the shadow of the crisis, the rumbling of suppressed earthquake—it is Desperation's lightning out of an atmosphere of degradation and misery that king, president and plutocrat have heaped upon humanity. *The bomb is the ghost of your past crimes.*

You may foam and legislate, arrest, imprison and deport. You may still further tighten the thumbscrews of persecution, erect more gallows, and build electric chairs. Pitiful fools! Thus was Christ crucified as a diturber of "Caesar's peace." Did Golgotha suppress his teaching? Have the un-

speakable tortures of the Inquisition eradicated free thought? Did Louis XVI save his crown—or his head—by *lettre de cachet?* Has the cause of the Abolitionists been defeated by the judicial murder of John Brown?

"Our graves will speak louder than the voices you strangle!" In spite of all the strenuous governmental, capitalistic and journalistic efforts to misrepresent and suppress Anarchists and Anarchism —because of those efforts the people will yet learn the truth.

Defendants' Exhibit L.

Friends:

I regret exceedingly that I cannot be with you all to-morrow night. I consider the work of the No Conscription League of such importance that I would have cancelled my date in Springfield had my comrades not gone to large expenses to arrange the meetings here. Since I cannot be present to-morrow, I wish you to know my position toward the work we have undertaken.

As I said at our great meeting, I am ready to go to any extent to back conscription objectors in their noble stand against murder. If it were a question of my own life even, I should still hold high to our Ideal of Internationalism and the spirit of solidarity which makes it impossible to serve the Capitalist class in its insatiable greed for profits.

But what I do with myself in behalf of my ideal is quite another matter from what I would suggest to you to do; I cannot and will not take the responsibility for your lives, your liberty. Therefore I want to place the following consideration before you:

1) Your refusal to register will mean imprisonment and conscription after your sentence is over.

Your consent to register will also mean conscription and your refusal to be conscripted imprisonment for many years perhaps. This may seem exaggerated, but I know the utter unscrupulousness of the American Government. I know it will surpass Europe in brutality and severity. Now friends, you must consider well what you want to do and do it only if you feel strong to carry out your decision. Do not depend on having the support of thousands. You may have them and you may not. It is best to make sure whether you will want to be consistent even if you have to stand alone.

Whichever way you decide, you can count on my support and backing. I place myself and MOTHER EARTH as the disposal of the profound Ideal—the No Conscription League, the determined opposition to war and coercion into the military noose.

I am strongly in favor of a Mother's No Conscription Meeting if a hall can be obtained. I suggest a second Manifesto addressed to Mothers to be distributed from house to house. If no hall can be obtained I suggest bill posting the town.

I will also suggest that arrangements be made with the labor Press to print the reasons why conscientious objectors will not register, signed by all those who will decide upon this course. Even if the labor Press has to be paid, such a proclamation ought to be printed on the day of registration. Comrades, the most important step is to know what you want to do and stand by it to the end. Then whatever happens you will have done your share to hasten the day when humanity shall awaken to the frightfulness, the cruelty and the uselessness of war.

Long live the spirit of Internationalism. Long live the Solidarity of Labor. Long live the Ideal of a free, proud, regenerated Humanity.

EMMA GOLDMAN.

The foregoing contains all of the testimony given at the trial, and all of the foregoing proceedings were had and exceptions taken and noted by the Court before the jury retired to consider of its verdict, and because the same would otherwise not appear of record the defendants pray the Court to sign this, their bill of exceptions, to have the same force and effect as to each of said exceptions as though the same were set forth in a separate bill of exceptions, which is granted; and accordingly, the Court signs this defendants' bill of exceptions, to have the force and effect aforesaid, now for then, this 19th day of September, 1917.

JULIUS M. MAYER,
Judge.

Notice of settlement waived September 18th, 1917.

FRANCIS G. CAFFEY,
U. S. Attorney, S. D. of New York

Assignments of Error.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

Now comes the above-named Alexander Berkman and Emma Goldman, plaintiffs-in-error, by their attorney, and make and file the following assignments of error upon which they will rely upon the prosecution of the writ of error to the Supreme Court of the United States sued out by them herein to review the errors committed in the above-entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against them in the said court:

That the District Court erred as follows:

FIRST: In not dismissing the indictment herein, upon the ground that the same did not charge the defendants with any offense against the United States or any law thereof in that it is not a violation of any law for defendants to have conspired and agreed among themselves and with other persons to aid, abet, counsel, command, induce and procure divers persons subject to registration to fail and refuse to present themselves for registration and submit thereto in accordance with "An act to authorize the President to increase temporarily the military establishment of the United States," approved the 18th day of May, 1917.

SECOND: In not granting the motion for arrest of judgment on the ground that the indictment did not charge an offense against the United States or any law thereof.

THIRD: In not setting aside the verdict upon the ground that the facts proved did not constitute an offense against the United States or any law thereof.

That the District Court erred in the construction and application of the Constitution of the United States and in the disposition of the merits of the case as follows:

FOURTH: In denying the defendants' motion made at the opening of the trial to dismiss the indictment upon the ground that the same did not charge the defendants with any offense against the United States or any law thereof upon the following grounds:

1. That there can be no conspiracy to violate the law entitled "An act to authorize the President to increase temporarily the military establishment of the United States," approved May 18th, 1917, also known as "The Conscription Law," in that the said Act is unconstitutional upon the following grounds:

A. It violates Section 13, Subd. I of the Amendments to the United States Constitution which reads as follows:

> "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction."

The said law imposes military, agricultural or industrial service, under any conditions determined by the military or Congress as to hours, condition

and pay, on all male persons in the United States between the ages of twenty-one and thirty, both inclusive, excepting officers and enlisted men of the regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service.

B. It violates Article I of the Amendments to the United States Constitution which reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

That this "Conscription Law" does establish a religion in that it gives a special privilege to members of "any well recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations" and it prohibits and invades the free exercise of the religion of any and all individuals not belonging to "any well recognized religious sect or organization at present organized and existing, and whose existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation in accordance with the creed or principles of said religious organizations."

C. It violates Article I of the United States Constitution, Section 8, Subds. 15 and 16, which provides:

> "That Congress shall have power (Subd. 15): to provide for calling forth the militia, to

execute the laws of the Union, suppress insurrections, and repel invasions." (Subd. 16): "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

That neither an invasion nor a rebellion is taking place, and further that the law does not call the Militia but calls upon all male persons with certain exceptions between the ages of twenty-one and thirty years inclusive.

D. It violates Article I, Section 8, Subd. 12, of the Constitution which reads as follows:

> "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

E. It violates Article IV, Section II, Subd. I, of the Constitution which reads as follows:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

That the said law imposes military, agricultural or industrial service on all male citizens between the ages of twenty-one and thirty years inclusive, with certain exceptions, thereby excluding the excepted classes and older and younger males.

F. It violates Article V of the Amendments to the Constitution which reads as follows:

> "No person shall * * * be deprived of life, liberty or property without due process of law."

FIFTH: In denying the defendants' motion to dismiss the indictment herein or to instruct the jury to acquit the defendants made at the conclusion of the case as presented by the United States upon the grounds contained in the first assignment of error, and upon the further ground that the indictment does not charge a crime; that upon all the facts proven the defendants are not guilty; that there is no proof that the defendants conspired unlawfully, wilfully, knowingly, feloniously together and with divers persons and did agree among themselves and with the said divers persons to aid, abet, counsel, command, induce and procure divers persons, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations prescribed by the President to unlawfully and wilfully fail and refuse to present themselves for registration and submit thereto; that there is no proof of any overt act to carry out the said conspiracy.

SIXTH: In denying the defendants' motion to set aside the verdict of the jury rendered against them which motion presented to the trial court was as follows: That the verdict was contrary to the evidence, contrary to the law.

SEVENTH: In denying the defendants' motion for an arrest of judgment upon all the grounds hereinbefore set forth.

WHEREFORE, the said Alexander Berkman and Emma Goldman, plaintiffs-in-error, pray that the said judgment herein for the errors aforesaid and for the errors in the record and proceedings herein may be reversed and altogether held for nothing, and that their said trial should go for naught and that the said plaintiffs-in-error may be restored to all things which they have lost by reason of said

judgment and for such other and further relief as to the Court may seem proper.

Dated, July Seventeenth, 1917.

HARRY WEINBERGER,
Attorney for Alexander Berkman
and Emma Goldman,
Plaintiffs-in-Error,
Office & P. O. Address,
261 Broadway,
Manhattan,
New York City.

Petition for Writ of Error.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiffs,

against

ALEXANDER BERKMAN and EMMA GOLDMAN,
Defendants.

Now comes the above defendants Alexander Berkman and Emma Goldman, by their attorney, and complain that on the 9th day of July, 1917, the District Court of the United States for the Southern District of New York gave judgment in the above-entitled cause against the defendants, in which judgment, in this cause, certain errors were committed to the prejudice of these defendants:

FIRST: In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause; all of which will appear more in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, the said defendants Alexander Berkman and Emma Goldman pray for the allowance of a writ of error and such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected, the said Justices of the said Supreme Court of the United States cause further to be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said Writ of Error by the said Supreme Court of the United States.

And your petitioner will every pray, etc.

Dated this 17th day of July, 1917.

HARRY WEINBERGER,
Attorney for Defendants
Alexander Berkman and Emma
Goldman,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
City of New York.

Supersedeas.

Writ of Error, to operate as a Supersedeas, allowed, returnable, according to law, the defendants to furnish bail in the sum of Twenty-five Thousand ($25,000) Dollars each, conditioned according to law, subject to the approval of one of the Judges of the United States District Court for the Southern District of New York.

Dated, July 19, 1917.

LOUIS D. BRANDEIS,
Associate Justice of the United States Supreme Court for the Second Circuit.

Citation.

UNITED STATES OF AMERICA, ss.:

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a SUPREME COURT OF THE UNITED STATES, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Alexander Berkman and Emma Goldman are plaintiffs-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiffs-in-error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable LOUIS D. BRANDEIS, Associate Justice of the Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Stipulation.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Southern District of New York:

Writ of Error and order allowing same, dated July 19th, 1917.

Indictment, filed June 20th, 1917.

Bill of Exceptions, dated September 19th, 1917.

Assignment of Error, dated July 17th, 1917.

Petition for Writ of Error and supersedeas endorsed thereon, dated July 19th, 1917.

Citation, dated July 19th, 1917.

Stipulation Settling Record.

Certificate, dated September 24, 1917.

Dated, New York, September 24, 1917.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant-in-Error.

Stipulation Settling Record.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, September 24, 1917.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant-in-Error.

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, in the City of New York, in the Southern District of New York, this 2 V day of September, in the year one thousand nine hundred and seventeen.

(Seal)

ALEXANDER GILCHRIST, JR.,
Clerk

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1917.

EMMA GOLDMAN and ALEXANDER BERKMAN,
Plaintiffs-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

No. 702.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
261 Broadway,
Borough of Manhattan,
City of New York.

HARRY WEINBERGER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

EMMA GOLDMAN and ALEXANDER BERKMAN,
Plaintiffs-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

No. 702.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

Statement.

The *indictment* charges the defendants with conspiracy as accessories before the fact for violation of the Draft Act as follows:

> "THE GRAND JURORS OF THE UNITED STATES OF AMERICA, within and for the District aforesaid, on their oath present that on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, the President of the United States of America duly issued his Proclamation as provided by the Act of Congress approved May 18, 1917, entitled, 'An Act to authorize the President to increase temporarily the Military Establishment of the United States.'

in which said Proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several States and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7 A. M. and 9 P. M. on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular army, the navy, the Marine Corps, and the National Guard and Naval Militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service:

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Emma Goldman and Alexander Berkman (hereinafter referred to as the defendants), both late of the City and County of New York, in the District aforesaid, heretofore, to wit, on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, and on each and every day thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense against the United States, that is to say: The said defendants unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with the said divers persons whose names

are to the Grand Jurors unknown, that divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress, approved May 18, 1917, entitled, 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' should unlawfully and wilfully fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress, approved May 18, 1917;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that the said defendants, Emma Goldman and Alexander Berkman, unlawfully, wilfully, knowingly and feloniously did conspire together and agree between themselves, and with the said divers persons whose names are to the Grand Jurors unknown, to aid, abet, counsel, command, induce and procure divers persons whose names are to the Grand Jurors unknown, the same being male persons between the ages of twenty-one and thirty, both inclusive, being subject to registration in accordance with regulations to be prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction stating the time and place of such registration, being under the duty as persons of the designated ages, except officers and enlisted men of the Reg-

ular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of the Act of Congress approved May 18, 1917, entitled, 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' unlawfully and wilfully to fail and refuse to present themselves for registration and to submit thereto, as provided by the aforementioned Act of Congress approved May 18, 1917;

And to effect the object of the said conspiracy, the defendant Emma Goldman, on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words, 'We don't believe in conscription!' and ending with the words 'we can support the point of real freedom and liberty and brotherhood,' at a public meeting held in the Harlem River Park and Casino, situate at Second Avenue, 126th to 127th Streets, in the City and County of New York, in the Southern District of New York;

And further to effect the object of the said conspiracy, the defendant Alexander Berkman, on the first day of June in the year of our Lord one thousand nine hundred and seventeen, did publish and cause to be published, in the City and County of New York, in the Southern District of New York, a periodical and publication entitled '*The Blast*, Vol. II. New York, June 1, 1917. No. 5';

And further to effect the object of the said conspiracy, the defendant Emma Goldman, on the second day of June in the year of our Lord one thousand nine hundred and seventeen, did give to one James A. Hagerty, at the office of the No-Conscription League, situate at 20 East 125th St., in the City and County of New York, in the Southern District of New York, a copy of a peiodical and publication entitled '*Mother Earth*, Vol. XII. June, 1917. No. 4';

And further to effect the object of the said conspiracy, the defendant Alexander Berkman, on the fourth day of June in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words 'Comrades, friends and enemies,' and ending with the words 'You know that after all, the cause of the soldiers and the workers is the common cause,' at a public meeting held at the Hunts Point Palace, situate at 953 Southern Boulevard, in the City of New York and County of Bronx, in the Southern District of New York;

And further to effect the object of the said conspiracy, the defendant Emma Goldman, on the fourth day of June in the year of our Lord one thousand nine hundred and seventeen, did deliver an address beginning with the words 'Men, don't you know that the soldiers came here to disturb the meeting?' and ending with the words 'and you will all raise one mighty voice just going to drown militarism,' at a public meeting held at the Hunts Point Palace, situate at 953 Southern Boulevard, in the City of New York and County of Bronx, in the Southern District of New York;

Against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided. (§§37 and 332 U. S. C. C., and §5 of the Act of May 18, 1917.)"

Nowhere is there any allegation of an actual violation of the Draft Act or of any principal who may have violated the act.

Assignments of Error.

These will be found *in extenso* on pages 534-539 of the transcript of record.

POINT I.

No crime charged in the indictment.

The indictment did not charge the defendants with any offense against the United States. It is not a violation of any law for defendants to have conspired and agreed among themselves and other persons to aid, abet, counsel, command, induce and procure divers persons subject to registration to fail and refuse to present themselves for registration unless alleged someone did fail to register because of defendants' acts. The lower court so stated to the jury *after the conviction* (p. 448), as follows:

> "The Government has thus far enacted no special statute to deal with those who counsel disobedience, and who advise insurrection, who seek to reach and control the humbler people, some of whom do not understand things, by methods such as were disclosed in this case."

If that was the Court's opinion, it should have dismissed the indictment at the opening of the trial.

However, we find that the defendants are really indicted as accessories under Section 332, U. S. C. C., which reads:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aid, abets, counsels, commands, induces or procures its commission, is a principal."

The indictment does not allege that any young man who was urged or solicited to refuse to register failed, as a result of said alleged conspiracy, to comply with the Registration Act, approved May 18th, 1917, or the Proclamation of the President of the

United States under date of the 5th of June, 1917. The indictment therefore does not state a crime, as there can be no accessory before the fact, unless there is a principal who has actually committed a crime.

In *Bishop New Criminal Law*, Vol. 1, Sec. 670, it is said:

> "Under a statute making it a felony to 'counsel, procure, or command any other person to commit any felony,' one becomes a felon only when the felony persuaded to is committed."

Sec. 671:

> "Moreover, statutes like these do not supersede the necessity of proving the guilt of the principal; for in the nature of things, one cannot procure what is not done, or receive the doer of what was never performed."

Citing:

> *Simmon* v. *State*, 4 Ga., 465.
> *Ogden* v. *State*, 12 Wis., 532.

In *U. S.* v. *Hartwell* (U. S. Circuit Ct., D. Mass.), a well-considered case, 26 Fed. Cas., No. 15,318, the Court said:

> "* * * * the charge against the accessory is in a certain sense ancillary to the offense committed by the principal. Take a case, for example, where it appears that the felony charged had never been committed; it could not be said within the meaning of the criminal law that one charged as an accessory before the fact procured, counselled, or commanded another to commit that felony. * * *.
>
> Whenever the accessory is indicted before the principal has been convicted, it is neces-

> sary that the indictment against him, whether they are indicted separately, or jointly, should allege the guilt of the principal, as the offense of the accessory, even when charged as such before the fact, depends upon the principal's guilt, and is never to be regarded as complete unless the principal offense was actually committed."

POINT II.

No evidence of defendants' guilt.

In *Chappel* v. *United States,* 160 U. S., 499, 509, the Court said:

> "This Court * * * has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits" (citing cases).

Direct appeals will be entertained where the construction or application of the Constitution of the United States is involved and the evidence is contained in a bill of exceptions.

> *Union & P. R. of M. N. Memphis,* 189 U. S., 71.
> *Elkin* v. *U. S.,* 142 U. S., 651.
> *Horner* v. *U. S.,* 143 U. S., 570.
> *Williamson* v. *U. S.,* 207 U. S., 425.
> *Spreckles Sugar Ref. Co.* v. *McClair,* 192 U. S., 397.

The provision "involves the construction or application of the constitution" does not make any

distinction between civil and criminal cases, and this Court will review judgment on writ of error, in criminal case.

Motes v. *U. S.*, 178 U. S., 458.

Defendants are charged with a conspiracy to have young men of draft age refuse to register, violating Section 37 and Section 332, U. S. C. C., and Section 5 of the Act of May 8th, 1917. To find a person guilty of conspiracy there must be an agreement and an overt act.

Pettibone v. *U. S.*, 148 U. S., 197.

Under Section 332 it must be shown that someone did not register by reason of defendants' acts in order to make defendants principals, as accessories before the fact.

See:

U. S. v. *Hartwell*, *supra*.

In *Buck* v. *Commonwealth*, 107 Pa. St., 486, the Court said:

> "Since the act of 1860 it is no longer necessary to convict the principal before the accessory can be tried, yet it is still requisite in some way to prove that the principals are guilty before the accessory can be convicted. No man can be accessory to a crime which has never been committed."

In *Ogden* v. *State*, 12 Wis., 592, the Court said:

> "For however clearly it may have appeared that Ogden counseled and advised Wright to commit the offense, yet if Wright never did so in point of fact, and the barn was set on fire by someone else, or by other means, then Ogden was innocent of the crime, with the

> commission of the crime (accessory before the fact), of which he stood charged."

In *Stabler* v. *Com.*, 95 Pa. St., 318, the Court said:

> "Merely soliciting one to do an act is not an attempt to do that act: *Rex* v. *Butler*, 6 C. & P., 368; *Smith* v. *Com.*, 4 P. F. Smith, 209. In this last case it was said, 'In a high, moral sense it may be true that solicitation is attempt; but in a legal sense it is not.'"

The following is a concise statement of all the facts as shown in the evidence:

Defendant Berkman was released from jail Monday night at 5 P. M., and the trial of the defendants proceeded Wednesday morning, June 27th (p. 9). Defendant Berkman had sustained a severe injury to his leg, and it was necessary for him to have proper medical treatment, and he was suffering great pain at the time (see p. 11, Dr. Max Strunsky's letter).

A motion was made to dismiss the indictment on the ground that the indictment does not charge a crime and that the Conscription Law is unconstitutional (p. 15).

The offices of *Mother Earth* magazine and *The Blast* magazine were at 20 East 125th Street, on two different floors, and the work for the No-Conscription League was done mostly in the office of *The Blast* (p. 17). The No-Conscription League was a voluntary association (p. 18), of which Mr. Berkman and Miss Goldman were members (p. 19). *The Blast* and *Mother Earth* were two separate, independent magazines; Mr. Berkman was editor of *The Blast* and Miss Goldman was editor of *Mother Earth* (pp. 22 and 49). Mr. Berkman was, however, editor of *Mother Earth* up to November, 1915, and later started *The Blast* in California (p.

50). *The Blast* was published in San Francisco up to March, 1917, when it came to New York City (p. 22). The No-Conscription League was formed May 9th (p. 23), before the Draft Law was passed, to protest against its passage (p. 24). The League got out a manifesto (Government's Exhibit 1, see p. 25, and Exhibit C, 451). A protest meeting was held May 18th, 1917, at the Harlem River Casino before the Draft Act was passed (pp. 27 and 58), and both defendants spoke (p. 28). The meeting started at about 8 P. M. and continued until about 10.30 (p. 69). Neither of the defendants had seen a newspaper or announcement that the Draft Bill was passed while the meeting was being held (p. 70).

No one at the meeting of May 18th knew that the Draft Law was passed (pp. 58 and 59), and they did not learn of it until after the meeting. The meeting was called the "no-conscription meeting," and the Government admitted that it was not a "no-registration meeting" (p. 60).

There was a committee meeting of the League held on May 23rd, at which Miss Goldman was not present, she being at Springfield, Massachusetts, lecturing (p. 63). Miss Goldman wrote a letter from Springfield.

There was a meeting held at Hunt's Point Palace on June 4th (p. 71).

Copies of the June *Mother Earth* and the June *Blast* were given out at the office of *Mother Earth* and *The Blast* office to a reporter (pp. 76 and 132).

Defendants were arrested June 15, 1917.

William H. Randolph, a patrolman of the New York City Police Department, who was also by training a shorthand reporter, attended the meeting at the Harlem River Casino on May 18th and took down the speech of Miss Goldman (p. 137); took down the speech and transcribed it. He testified

that he could take from 125 to 150 words a minute (p. 140), but that his average was about 100 to 125 words a minute (p. 154). His notebook showed that Miss Goldman finished speaking at 10.15 P. M. (p. 143). He took his notes standing on a table without support for his book (p. 145). Mr. Randolph states that she said at that meeting of the 18th of May: "We are going to support all the men who will refuse to register" (p. 161). He also testified that Miss Goldman said at that meeting: "We believe in violence and we will use violence" (p. 162). Police, detectives and secret service men were there, but did not interfere with Miss Goldman's speech (p. 162).

Mr. Charles Pickler, for the defense, a member of the bar of the State of New York and the Federal Bar, and an expert shorthand reporter for twenty-five years (pp. 163 and 165), capable of taking 225 words a minute (p. 220), reported and transcribed the speeches of Emma Goldman and Berkman at Hunt's Point Palace at the request of the No-Conscription League. Mr. Pickler testified that under the circumstances testified to by Mr. Randolph he could not take her speech down as she talks 200 words a minute (pp. 166 and 167; see also p. 220). When Mr Randolph was put to a stenographer's test he failed woefully (pp. 183 to 187).

Mr. John C. Dillon, a stenographer in the employ of the New York Police Department, a Government witness, testified Emma Goldman speaks about 125 words a minute (p. 199). A large part of the trial was taken up with the contentions in reference to the meeting of May 18th, in reference to violence, and supporting men who will refuse to register, but all of that was taken away by the Judge, incidentally, in his charge as not to be considered by them (p. 437), but the effect of the evidence was left there, the grilling of the witnesses and the at

titude of the Court in reference to the meeting of May 18th, left the impression of the Court's desire for defendants' conviction.

At the end of Government's case a motion was made to dismiss on the ground no evidence that Emma Goldman and Berkman advised people not to register or that their writings advised people not to register (p. 204), which motion was denied and exception taken.

The Court should have dismissed at the end of the Government's case, the Court being of the opinion that telling people not to register is not a crime (see Point I). The defendants could not have committed an offense against the Draft Act, or conspired to do *an act* against the law, because neither was subject to the draft. They might have conspired to ask someone to do an act, by not registering, but that would not be an overt act on the part of the defendants.

In 8 *Cyc.*, 628, it is stated that:

> "By a Federal statute (U. S. Rev. St., Sec. 5440)" (now Sec. 37, U. S. C. C.) "it is made a punishable offense for two or more persons to conspire to commit any offense against the United States. Conspiracy as used in this statute means an unlawful agreement to do some act which by some law of the United States has been made a crime, and three elements are necessary to constitute it: (1) *For two or more persons to conspire together;* (2) to commit an offense against the United States; (3) *an overt act of one or more parties to effect the object of the conspiracy. In re Wolf*, 27 Fed., 606; *U. S. v. Cassidy*, 67 Fed., 698."

See:

U. S. v. Barrett, 65 Fed., 62.

If the meeting of May 18th is eliminated from the case, as the Court did at the end of the trial, the motion to dismiss at the end of the Government's case should have been granted, because then there was no evidence before the Court at all.

Lincoln Steffens, reporter, correspondent and magazine writer, for the defendants, testified that he had reported the first speech Emma Goldman ever made and had heard her talk often and had private discussions with her and had never heard her say she would use violence (p. 216). Nor that she would tell others to use violence, but that as a matter of fact, he had heard her say that she was opposed to violence, and that as to war and militarism she had always been opposed to it (p. 217).

Paul Munter, public stenographer and official stenographer for Hon. Peter B. Olney, referee in bankruptcy, stenographer for twenty years (passed No. 1 as court stenographer for Supreme Court, Westchester County, with rating 94 per cent.), has reported Emma Goldman's lectures and speeches often since 1914. He was of opinion she spoke at not less than 150 words a minute and often went over 200 words a minute (pp. 223 and 224).

Helen Boardman, a psychological research worker for the Bureau of Educational Experiments, a witness for defendants (whose forefathers came to this country 1640), testified that she did not hear Emma Goldman, at the May 18th meeting, say, "We believe in violence and we will use it" (p. 227). That she heard Emma Goldman say she would not advise people not to register, and the reasons for not advising them was that she, Emma Goldman, was not subject to registration herself and that it was a matter for each individual's conscience (p. 228; see also p. 229).

Mary Eleanor Fitzgerald testified (p. 241) that a letter sent from Springfield, Mass., by Miss Gold-

man, was read at an informal meeting of No-Conscription League on May 23rd (Defendant's Exhibit L, p. 531), against advising people not to register, and giving the reasons. This letter specifically states, "But what I do with myself in behalf of my ideal is quite another matter from what I would suggest to you to do; I cannot and will not take the responsibility for your lives, your liberty." This exhibit was a typewritten copy of the original letter, and was taken by the Government in its sudden raid of defendants' offices on June 15th (p. 233).

That was the stand of defendants and the No-Conscription League, "not to tell people not to register" (pp. 252 and 253).

Anna Sloan (wife of John Sloan, the painter), testifying for defendants, testified that she did not hear Emma Goldman say: "I believe in violence and we will use violence," and that she had told her, in previous conversations, she did not believe in violence (p. 273).

Rebecca Shelley (a former school teacher, and college graduate) testified for defendant that she heard the statement contained in Defendants' Exhibit L from Miss Goldman at the May 23rd meeting (p. 281).

Minna Lederman (a graduate of Barnard College) testified for defendants that at the May 18th meeting she did not hear Emma Goldman advise or urge the people not to register, nor did she say that "We believe in violence and we will use violence" (p. 291). Many other witnesses of unimpeachable position testified to the same effect.

Bolton Hall, lawyer and writer, testifying for defendants, stated he knew Emma Goldman for more than twenty years, and never heard her urge violence (p. 306).

The Court, in its charge to the jury (p. 437), said question of "violence" not germane, but the effect on the jury could not be eradicated after they had heard that question pounded at for days. It would be humanly impossible for them to leave it out of their deliberations, and it helps explain the verdict of "guilty" brought in by them. The Court knew that "We believe in violence" was no part of Government's case, but he left it in. He knew the whole meeting of May 18th was inadmissible, as the Draft Act had not been signed; yet the Court only casually says it is not to be considered by jury. As a matter of fact, it was impossible for any jury to eliminate "We believe in violence" and the rest of the May 18th meeting from their minds or verdict.

Motion made to dismiss at end of case (p. 426), and should have been granted (see Point I).

Court charged (p. 429) that:

> "Before act passed May 18, 1917, any person could discuss in the fullest manner possible the provisions of pending legislation and * * * use the most vehement language, etc."

Judge charged (p. 437) the jury must find that Draft Act was not signed until after Emma Goldman was through talking at meeting on May 18th, so that everything that was said by Emma Goldman (Berkman spoke before Emma Goldman) at that meeting cannot be considered part of the overt act and the Court so charged, and therefore the whole case of the prosecution falls. What was said at the Hunt's Point Palace is not disputed, as we had our stenographer there, and the people were not advised or urged not to register (Government's Exhibit 33, see p. 495).

When the jury brought in the verdict of guilty, at 6 P. M. (p. 444), Miss Goldman asked that sentence be deferred for a few days, and that bail be continued (bail was $25,000 cash each), because defendants wished to arrange their affairs, which they had not been able to do during the trial. The Court denied this, and proceeded to the sentence (p. 445), but did inform defendants, *who were in custody*, that they could make application for bail to the Circuit Court (p. 445). The Circuit Court was in recess, and defendants could not walk out of the court room, being in custody, to look for a judge of the Circuit Court at 6 P. M.

The Court then expressed to the jury "the appreciation of the Court and of the community * * * for your fearless and prompt manner in which you have discharged your duty."

And then the Court in an equally fearless and prompt manner imposed the full penalty of the law, "two years and $10,000 fine," on each defendant, and ended by saying, "The responsibility for the custody of the defendants is with the Marshal for the Southern District of New York. He may exercise such discretion in that regard as he deems best" (p. 449). Defendant Goldman informed the Court they intended to appeal the case, and the Court told them they could have ninety days to sue out a writ of error. He also told them they would have the fullest opportunity within the ninety days to consult counsel and prepare their assignments of error and writs of error; but when Miss Goldman asked whether within the next hour or two they could consult with counsel regarding the appeal the Court replied: "The custody of the defendants is with the Marshal, and the Marshal will deal with the matter referred to. The court is now adjourned" (p. 450).

Straight from the court room, after 7 P. M., the defendants were taken to the Marshal's office, to await the leaving of the train for Atlanta and Jefferson prisons later that night.

When before in the history of any court was a defendant forced to trial when suffering great pain due to injuries received? When before was a reasonable adjournment refused in the United States courts when one of the defendants was only one day out of jail on tremendous bail; and when before has any judge sitting on the criminal side of the United States Court refused a writ of error to a defendant who informs him that an appeal will be taken? The only question has always been the amount of bail. And in this case each defendant had deposited as bail $25,000 cash. Never before in the history of any court were defendants taken from the court straight to jail by the Marshal, when the defendants asked time to consult counsel in reference to an appeal or a stay. The defendants asked a few days to arrange their affairs, which was refused. Both were publishers of magazines and books and had large affairs that had to be taken care of while they were serving the limit of the law. These defendants were, in the eyes of the law, like all other defendants charged with crime, and entitled to all the rights and privileges accorded to all defendants, for the sake of the law and a people's belief in its unvarying action.

All this, and the refusing of an adjournment at the commencement of the trial, though defendant Berkman, just one day out jail on $25,000 bail, and suffering great pain, though it may not be strictly legal error, gives a better picture of the bitterness and attitude of the Court and its desire for a conviction of the defendants, which, with the war hysteria at the time, meant that no jury could weigh the testimony fairly, and were bound to con-

vict, even without evidence. Perhaps the defendants, as far as the record is concerned, appear to have gotten the letter of the law, but they did not get the spirit—which means justice and a fair trial.

The charge is defendants conspired to advise and to urge men of conscriptable age not to *register*. The overt act charged is speeches and articles.

The Government failed to prove conspiracy.

The Government failed to prove that defendants or either of them told young men of conscription age not to register. No evidence of young men of draft age, who failed to register.

All kinds of evidence was allowed in, happenings of years ago, the defendants' theories and beliefs, but no evidence of the overt acts charged, no evidence of the guilt of any principal. The May 18th meeting and "violence" were paraded before the jury for days. Evidence that the defendants were anarchists, and therefore opposed to all governments, including the United States Government, is admitted, and was proved by the United States District Attorney, and made the most of. That defendants are internationalists, and therefore opposed to all national wars, including this one, is admitted, and was proved by the District Attorney, but those are not the crimes charged against the defendants, that is not how the indictment reads, though that is what they were convicted of, because the attitude of the Court and of the District Attorney, as shown in the record, called for a conviction on "patriotic grounds."

The no-conscription manifesto (Government's Exhibit 1, p. 451) does not tell people not to register, it does oppose conscription. It says, "The No-conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war." That was the purpose of

the league, formed before the Draft Law was passed (p. 23).

There was no proof of a conspiracy, because there was none. That the defendants had similar ideas which they expressed on a public question, which they had for the past twenty years, is no proof that they *conspired* to tell young men between the ages of twenty and thirty years, inclusive, not to register. See *U. S. v. Donan*, 11 Blatchf. (U. S.), 168, and *U. S. v. Goldberg*, 7 Bissell's (U. S.), 175. As a matter of fact, there was no *legal* evidence submitted to the jury that the defendants' speeches or writings reached young men subject to the draft, even if they had told anyone not to register. If defendants had conspired and told an audience of women, "Don't register," could it be contended there was a violation of law? It was incumbent on the Government to submit proof that young men of draft age had been reached by defendants' speeches and articles.

That defendants expressed opinions about conscription and war is admitted, but there was no evidence that they advised people to disobey the law. They strongly disapprove of the law, just as many people disapprove of the income tax, or a hundred different laws and express their opinion of those laws, bring test cases to break those laws, but no one was ever convicted before of the crime of disapproving of laws. What of the men and corporations who strongly disapproved of the first income tax law, and that they brought before this Court, and this Court declared unconstitutional? What of the Eight-hour Law on the railroads, that this Court declared constitutional, and of which many editors and railroad men disapproved and voiced their disapproval. The expression of disapproval is necessary before any law can be changed, before

Congress can know what the people want, but that does not mean that those who express that disapproval are urging people to break or resist the law. Many people to-day are strongly pro-war, and yet disapprove of conscription.

The letter written in Springfield, Mass., by Emma Goldman to the meeting of May 23rd of the league, disposes of the conspiracy charge, disposes of alleged overt acts to tell people not to register, more than pages of testimony. She says she will not advise young men not to register. Does that not dispose of the whole case? At the Hunt's Point meeting Emma Goldman expressly stated that she cannot and would not tell people not to register.

These defendants are not the kind of defendants who, when brought before the Bar, deny their beliefs merely because they may go to jail. Their letter to Assistant District Attorney Content (Government's Exhibit 35, p. 499) protesting against the arrest and imprisoning of Kramer and Becker shows that they do not shirk responsibility, they do not deny their position on public questions. The reputation of the defendants, whether the Court believes it enviable or unenviable, is too well known to believe they would deny their principles and preachings for a minute. But even anarchists can consistently fight the charge of an imaginary crime, with imaginary evidence, and they should not seek justice in vain.

One must know the ideals of these people. Frankly they will not obey a law if it interferes with their ideals or their conscience. Frankly they have advocated their principles for years, as shown, for instance, Exhibits B-C, published 1909-1910 (p. 524), entitled "A New Declaration of Independence." But that very principle of ideals and conscience above law explains why defendants would not tell others not to register because, defendants

not being of registration age, the ones who followed their advice, if given, would have to suffer the penalty of the law.

To understand how this conviction of these defendants were had, with no evidence of an agreement to conspire, with no evidence of an overt act to tell *anyone* not to register on June 5th, and absolutely no legal proof of the defendants' speeches or their articles having reached young men between the ages of twenty-one to thirty inclusive, or that any young man subject to draft did refuse to register on account of defendants, one must picture the scene of the trial. A Judge presiding at the trial who had already held the defendants in the astounding sum of Twenty-five thousand ($25,000) dollars bail each for trial, which had to be put up in cash, every surety company refusing to go bail; who when the case was called for trial refused even a reasonable adjournment, though defendant Berkman was only one day out of jail, and suffering great pain at the time because of his leg (p. 11), and defendant Goldman had been out less than a week, during all of which time she had tried to raise cash bail for Berkman (pp. 7 and 8). Then, as this record of the trial is read, the questions asked by the Judge of witness after witness, when he believes the prosecutor has been weak in his examination and cross-examination, the remarks and the objections of the District Attorney continually echoed by the Court, the feeling in the court room that a conviction must be obtained is realized. As illuminating as is the refusal of the Court to give the defendants a reasonable adjournment at the beginning of the trial, more illuminating of the attitude of the Court throughout the trial was the refusal of a few days' stay before the sending of the defendants out of the State to commence the service of their sentence.

which was the full extent of the law. All of this may not be judicial error (see *Goldsby* v. *U. S.*, 160 U. S., 70; *Isaacs* v. *U. S.*, 159 U. S., 487), but it makes the examining closely of the facts absolutely necessary, to see if an injustice has been done in the conviction. The non-acceptance by the Court of the philosophy of the defendants makes the necessity of doing them justice all the more necessary. Because, if there was no prejudice against defendants, if there was no war hysteria at the time of the trial, there would probably have been no conviction to appeal to this Court.

The crime charged against the defendants is that they conspired to advise and did advise young men, who were subject to draft, not to register, and that said young men did not register.

It has been uniformly held that defendants can only be convicted of the crime charged.

In *United States* v. *Cruikshank*, 92 U. S., 542, this Court said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States* v. *Mills*, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged' * * *.
>
> The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, * * *; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intents; and

> these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

The facts charged were not proved. There is no legal evidence in the whole record that young men of draft age heard defendants or received their literature. This Court cannot speculate that there were young men, no more than the jury had the right to. Suppose defendants had actually said "Don't register" and had said it to an audience of women; would that be a violation of law, even if they had conspired to say it? They would not. See *United States* v. *Cruikshank*, *supra*. The prosecution had the duty under the indictment and the law to show that people who were advised, aided or abetted were subject to draft, and it had to show it by legal evidence. It had in addition, as defendants were charged as principals, to show some young man of draft age who actually did not register because of defendants' speeches or articles, and no proof was offered, and not even charged in the indictment, that any did fail to actually register.

The law of conspiracy is elementary and needs no citations to this Court. I submit that under the law of conspiracy, two defendants who expressed the same ideas at a meeting or wrote for two different magazines would not be guilty of conspiracy, no more than two Republican or two Democratic speakers or two editors expressing the same ideas would be guilty of conspiracy.

The more wrong the defendants may be considered in their beliefs and in their philosophy of life by the courts, the more sure the courts should be that they had a fair trial and that their conviction now before this Court was not obtained without evidence and merely by prejudice created inside and outside the court room.

Even the least among us are entitled to justice.

POINT III.

The Draft Act is unconstitutional.

A. **It violates Section XIII, Subdivision 1 of the Amendments of the United States Constitution:**

> **"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."**

By registering, according to a proclamation of General Crowder, all men between the ages of twenty-one to thirty inclusive become immediately soldiers of the United States—not by enlistment, not by being mustered in, but by the mere act of signing their name, subject to be court-martialed and shot if they should fail afterwards to appear for physical examination and enrollment. *They must then obey military orders to serve at home or abroad.* They may, according to proclamations of the President and the new rules of the War Department, become liable to be assigned to duty at manual labor in mines, factories and fields (see also Section 4 of Draft Act).

Appreciating the importance of this question, its relation to the fundamental principles of American liberty, and the necessities of the National Government, it is not my contention nor belief that a soldier is a slave. A volunteer soldier is a free man fighting for what he believes. But where he does not volunteer for service in the United States army, the conscripting him is involuntary servitude, if the English language means anything. If the conscript is forced into military, agricultural, industrial or mining work—as the Government proclaims it intends to do—that is clearly involuntary servitude.

Millions of young men have complied with the rigid conscription law; many have done so unwillingly, some only after protest, some have obeyed only under threat of arms, others have altogether refused, many have claimed exemption. Only those that have offered some sort of protest have expressed themselves as to the value and validity of military service. The others have merely obeyed the law as written. Their action in registering can hardly indicate an opinion with regard to conscription. The attempt to make it appear an endorsement of any national military policy is either due to lack of logic or a desire to misrepresent the attitude of those called upon to comply with it.

Conscripted, many unwilling, but we are a law-abiding people, and obey the law, until this Court, if it shall so decide, shall declare it unconstitutional.

To prevent usurpation and despotism by the executive power has always been the task of liberty-loving people, and that is why we have checks and balances in our Constitution.

Public interests and private rights, the liberty of the citizens and the power of government is all entwined in this case.

The words of Section XIII of the amendments are plain and determinate, clear and the sense distinct and perfect, and they require no interpretation or construction. The words are to be taken in the sense which they naturally bear on their face.

> *United States* v. *Fisher*, 2 Cranch., 386.
> *Lake* v. *Rollins*, 130 U. S., 662.
> *Doggett* v. *Florida R. Co.*, 99 U. S., 72.

In the *Slaughter House* cases, 16 Wallace, at page 69, the Court said:

"Its two short sections (13th Amendment) seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated:

1. * * * this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves * * *. That a personal servitude was meant, is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word 'servitude' is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. * * *

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction; undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent."

In *Barley* v. *Alabama*, 219 U. S., 219, 240, Mr. Justice Hughes said:

"The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and

> gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. *It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.*
>
> The words 'involuntary servitude' have a 'larger meaning than slavery.' 'It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West Indies Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used.' *Slaughter House* Cases, 16 Wall., p. 69. The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

It forbids not merely the slavery heretofore known to our laws, but all kinds of involuntary servitude not imposed in punishment for public offenses.

Matter of Turner, 1 Abb. U. S. R., 84.

In *Robertson* v. *Baldwin*, 165 U. S., at page 281, the Court said:

> "Not that all such contracts (or servitude of a sailor or soldier) would be lawful, but that *a servitude which was knowingly and willingly entered into could not be termed involuntary.* * * * From the earliest historical period the *contract* of the sailor has

> been treated as an exceptional one, and involving, to a certain extent, *the surrender of his personal liberty during the life of the contract.*"

But if it had been shown that the contract of servitude had not been voluntarily entered into (whether of soldier or sailor) according to the reasoning of the Court, the sailor or soldier would have been entitled to release on writ of *habeas corpus.*

Justice Harlan wrote a strong dissenting opinion, and with all due respect to this Court, in my opinion the majority were wrong in not construing that seamen were protected by the Thirteenth Amendment, though they did have ancient law and custom to sustain their decision. Justice Harlan well said:

> "Those (ancient) laws, whatever they may have been, were enacted at a time when no account was taken of man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and the pleasures of despotic rulers rather than promote the welfare of the people."

But even the majority opinion refers to "a servitude which was knowingly and willingly entered into could not be termed involuntary." But there can be no claim that the drafted men voluntarily enter the army. Therefore, it would be involuntary servitude even according to the majority decision of this Court in this case. Congress has since passed the Seamen's Act, which has removed the injustice of this decision.

The word "servitude" was not an unknown word in 1865. *Reeves History of English Law*, Pt. 1, C. 1:

> "These are the persons who are described by Sir William Temple as 'a sort of people

> who were in a condition of downright servitude, used and employed in the most servile works; and belonging, they and their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it.'"

In 1514 Henry VIII manumitted two of his villeins in the following words:

> "Whereas God created all men free, but afterwards the laws and customs of nations subjected some under the yoke of servitude, etc." (*Barrington on Statutes*, 3rd Ed., 275).

The word "servitude" as used in the Constitution of the United States, Amendment Thirteen, means a condition of enforced compulsory service of one to another; "servitude" being defined by Webster as "the state of voluntary or compulsory subjection to a master."

> *Hodges* v. *United States*, 203 U. S., 1, 17; 51 L. Ed., 65.

Bouvier's Law Dictionary defines "Involuntary":

> "An involuntary act is that which is performed with constraint or with repugnance, or without the will to do it. An action is involuntary which is performed under duress. Wolffins Inst., Section 5."

Black's Law Dictionary defines

> "Involuntary servitude. The condition of one who is compelled by force, coercion or imprisonment, and against his will, to labor for another, whether he is paid or not" (citing cases).

Blackstone, 1 Bl. Com., 134, said:

> "Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's

> own inclination may direct, without imprisonment or restraint, unless by due course of law."

The meaning of the word servitude as contended for here is not new.

The Century Dictionary defines

> "Servitude: Service rendered or duty performed in the army or navy. A state of spiritual, moral, or mental bondage or subjection; compulsion; subordination.
>
> Involuntary. Not voluntary or willing: contrary or opposed to will or desire; unwilling."

Funk & Wagnall's Standard Dictionary also defines servitude as "service in the army or navy."

The New English Dictionary, edited by Sir James A. H. Murray, Oxford, 1914, defines servitude:

"The absence of personal freedom. A person's (period of) service (in the Navy)."

1471 Caxton Recuyell (Sommer) II. 611 or that we shall be ledde in seruytude & bondage in to strange contreyes.

1776 Gibbon Decl. & F: XIII. I. 270. The greatest part of the nation was gradually reduced into a state of servitude.

1845 Sarah Austin Ranke's Hist. Ref. IV., IV. II. 457. It enabled them to reduce the peasantry to a still harder state of servitude.

1862 Buckle Civiliz. III. IV. (1869) 192. The religious servitude into which the Scotch fell * * * was a willing servitude.

1818 Tuckey's Narr. Exped. R. Zaire Introd. p. XIIX. Though wanting eighteen months for the completion of his servitude to qualify him for a lieutenant's Commission.

1836 Marryat Three Cutters ii, "During my servitude as first lieutenant."

Australia had her people vote on conscription and it was rejected. Canada, after more than three years of war, voted for conscription, but did not let the people vote upon the question, and it is now being debated before the people. England raised four million volunteers before conscription was passed, and her Parliament is not limited by a constitution. Even despotic Germany when she sent soldiers to suppress the Boxer Rebellion in 1900 sent volunteers (Reichstag Report, Vol. 1, pp. 225-228), and her colonial troops can only be enlisted for overseas service upon their voluntary application (Sec. 2, Law of July 5, 1896, R. G. P. 1, p. 653; also Act of July 25, 1898, amended August, 1908, and in force at the outbreak of the European War). But we in the first days of the war, without thought of the spirit of our institutions or the specific prohibition contained in the Thirteenth Amendment to the Constitution, institute conscription for oversea service at once.

The story of despotism is always quite the same. The absence of understanding, or appreciation, of liberty on the part of the masses and the natural lust for power, which makes every human a potential tyrant, makes him indifferent to all tyranny which does not directly affect him. The initial exercise of tyrannical power always has to do with subjects as to which there is great public indifference, or a quite general approval, at least, of a sentimental sort. The populace thus accustomed to the exercise of tyrannous authority doze on with the delusion of liberty secure, while the lust for power induces officials to extend their authoritarian might from one subject to another, until in the end the masses awake to find they possess all their liberties only as tenants at will of masters whom they thought servants of their own creation.

Herbert Spencer's definition of liberty is:

> "Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man."

B. **It violates Article I of the Amendments of the United States Constitution, which reads as follows:**

> **"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."**

And if this law is constitutional, the Court will add: "Except when the Government desires to conscript."

The Draft Act, Section 7, Subdivision 4, exempts

> "regular or duly ordained ministers of religion, students * * * preparing for the ministry in recognized theological or divinity schools, * * * and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations."

We contend that this clause establishes a religion or prohibits the free exercise thereof and is a new combination of church and state.

Story on the Const., Section 454, says:

> "* * * Congress shall make no law respecting an establishment of religion which seems to

> prohibit any laws which shall *recognize*, found, confirm, or *patronize* any particular religion, or form of religion, whether permanent or temporary, whether already existing or to arise in future. In this clause establishment seems equivalent in meaning to settlement, *recognition* or *support*."

Sixth article, Subd. 3rd of the Constitution:

> "But no religious test shall ever be required as a qualification to any office or public trust under the United States."

This clause respecting the elimination of a religious test was unanimously adopted (*Journal of Convention*, p. 313). *Story on the Constitution*, Book II, p. 615, Sec. 1847, says:

> "This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons who feel an invincible repugnance to any religious test or affirmation. *It had a higher object—to cut off forever every pretence of any alliance between Church and State in the national government.* The framers of the Constitution were fully sensible of the dangers from this source marked out in the history of other ages and countries, and not wholly unknown to our own. They knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendancy over the human, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility."

The history of England and all European countries and the early days of our own country showed to the makers of our Constitution the importance of this clause. It was to exclude all

rivalry for the control of the Government by any church.

For the first time in our national history the nation holds an inquisition into a man's faith or his mode of worship or the church he attends, and imposes duties or grants exemptions accordingly.

Cooley Const. Lim., p. 659:

> "A careful examination of the American constitution will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and *to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief.* The American people came to the work of framing their fundamental laws, after centuries of religious suppression and persecution, sometimes by one party or sect and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions by rewards, penalties or terrors of human laws."

And at page 663:

> "*Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.*"

In *Reynolds* v. *United States*, 98 U. S., 145, 162, Chief Justice Waite said:

> "Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.

> The word 'religion' is not defined in the constitution. We must go elsewhere, therefore, to ascertain its meanings, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.
>
> Before the adoption of the Constitution, attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia."

The opinion then gives a history of the struggle in Virginia in 1784 for religious liberty and the passing of a bill drafted by Thomas Jefferson "for establishing religious freedom." The Court then quotes from an address by Mr. Jefferson "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship."

In *Davis* v. *Beason*, 133 U. S., at p. 342, the Court said:

> "The first amendment to the Constitution, in declaring that congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be ap-

> proved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."

The old combination of church and state was not only an official state church, but the granting of special privileges to churches or to ministers. The case of *Mormon Church* v. *United States*, 136 U. S., 1, reviews the history of many different forms of combination of church and state.

In England the "right of clergy" exempted clergymen or those who could read and write from prosecution for crime by the civil authorities. At other times in the history of the combination of church and state, the churches were entitled to a percentage of the produce of the people. Its manifestations were many and various, in this country in the early days, as well as in Europe.

See:

> *Jefferson Works*, I, 38.
> *Life of Madison*, by Reeves, I, 42.
> *Terreti* v. *Taylor*, 9 Cranch., 43.

Different religions, as far as this Government is concerned, does not or should not exist. Congress has no power to foster and aid well-recognized churches or sects.

2 *American Museum*, 552 (1787), from the address and reasons of dissent of the minority of the Convention of the State of Pennsylvania, to the adopting of the Constitution, to their constituents, offer the following propositions to the convention:

"Secondly: The rights of conscience may be violate: as there is no exemption of those persons, who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the State. This is the more remarkable, because, even when the distress of the late war, and the evident disaffection of many citizens of that description, inflamed our passions—and when every person who was obliged to risk his own life must have been exasperated against such as on any account kept back from the common danger—yet even then, when outrage and violence might have been expected, the rights of conscience were held sacred.

At this momentous crisis the framers of our State Constitution made the most express and decided declaration and stipulation in favor of the rights of conscience; but now, when no necessity exists, those dearest rights of men are left insecure."

Story on Const., Section 53, said:

"Each sect, as it attained power, exhibited the same unrelenting firmness in putting down its adversaries. * * * There are not wanting on the records of the history of these times abundant proofs, how easily sects, which had borne every human calamity with unshrinking fortitude for conscience' sake, could turn upon their inoffensive, but, in their judgment, erring neighbors with a like infliction of suffering."

In 4 *Elliot's Debates*, page 194, Iredell says:

"Happily, no sect here is supreme to another. As long as this is the case, we shall be free from those persecutions and distractions with which other countries have been turned. If in future Congress shall pass an act concerning religion of the country, it would be an act which they are not author-

> ized to pass by the Constitution, and which the people would not obey."

It is not the religious distinction itself, but the authority that compels it, the danger of this precedent, and the possibility of further religious encroachment that is dangerous. Not when we have a State Church, but now is the time to object.

As Dr. Priestly said:

> "A tax of a penny is a trifle, but a power imposing that tax is never considered as a trifle, because it may imply absolute servitude in all who submit to it."

Opposition to war or to combatant service need not be a tenet of the minister of religion or of the students preparing for the ministry for them to get exemption. They may believe in wading in the blood of their enemies, but they are exempted from military service.

You may have two persons of exactly the same religious conviction of opposition to participating in war in any form. They may believe firmly, "Thou shalt not kill." Both of them may be equally honest; both may be equally moral; both derive their convictions from the same source, their conscience; but one of them belongs to a certain particular sect and the other does not. The one who belongs to the well-recognized religious sect is exempted from the duty of engaging in the combatant service of the war if those are its principles, and the other, for his honest conviction, because he refused to serve, is made a felon and subjected to severe penalties. If this is not making a law "respecting an establishment of religion" and "prohibiting the free exercise thereof," "establishing inequality" and "making religious distinctions," no such law can be devised.

The Court cannot strike out the exemptions and itself remodel the act so as to make it uniform. It is not within the judicial province to make a new law. If these exemptions had not been made, the law might never have been passed. The Court will not strike out these exceptions and exemptions so as to give the act an operation which Congress confessedly never meant. If you annul the exemptions, what warrant of law would exist for drafting those exempted? As Mr. Justice Matthews said in the case of *Spraigue* v. *Thompson*, 118 U. S., 90, 95, delivering the opinion of the whole Court, this would confer

> "upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

Would Congress have passed a law drafting ministers?

Where unconstitutional purposes are completely mingled with what alone would be proper, the whole must be rejected.

Allen v. *Louisiana*, 103 U. S., 80.

C. The Draft Act violates Article I of the United States Constitution, Section 8, Subdivisions 15 and 16:

> **"The Congress shall have power—**
>
> **15. To provide for calling forth the Militia, to execute the laws of the Union, suppress Insurrections and repel Invasions;**
>
> **16. To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving**

to the States respectively the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress."

As Story, Section 1897, says:

> "The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of powers by rulers."

In *Houston* v. *Moore*, 5 Wheat., 1, 48 (1820), Mr. Justice Story said:

> "*Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution.* * * *
>
> It is almost too plain for argument, that the power here given to Congress over the militia, is of a limited nature, and confined to the objects specified in these classes; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception, merely from the power given to Congress 'to provide for organizing, arming and disciplining the militia'; and is a limitation upon the authority, which would otherwise have devolved upon it, as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States, over the militia. What those powers are must depend upon their

own constitutions; and what is not taken away by the Constitution of the United States must be considered as retained by the States or the people. The exception, then, ascertains only that Congress have not, and that the States have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by Congress. * * *

The States in virtue of their sovereignty, possessed general authority over their own militia; and the Constitution carved out of that a specific power in certain enumerated cases."

Judge Washington, at page 15, said:

"* * * What are the powers granted to the general government by the Constitution of the United States over the militia? * * *

The Constitution declares that Congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming, and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided, that the President of the United States shall be commander of the militia, when called into the actual service of the United States."

Judge Johnson, page 38:

"Whenever bodies of militia have been called forth for the purpose of general defense, it is believed that in no instance has it been done otherwise than by requisition, the only mode practised towards the States from the commencement of the Revolution to the present day. * * *." (At p. 46) "I will make one further observation in order to prevent myself from being misunderstood. I

> have observed that the governors of the States, as military commanders, must be considered as subordinate to the President. I do not mean to intimate, nor have I the least idea, that the Act of 1795 gives authority to the President to issue an order to the governor in that capacity. I hold the opinion to be absurd; for he comes not within the idea of a militia officer in the language of that act. If he is so, what is his grade? He will not be included under any title of rank, known to the laws of the United States, from the highest to the lowest. And how is he to be tried? What is his pay? What his punishment? An act which authorizes an order for militia, obviously authorizes a requisition. * * * But the power of ordering out the militia is an alternative given to the President when the other is too circuitous or likely to fail. In that case, the President, may address himself to the executive; and having obtained, through him, the necessary information relative to the distribution and organization of the militia, may proceed, under his own immediate orders, to draft and detach the members wanted."

The Second Amendment to the Constitution,

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed,"

is a limitation only upon the power of Congress and the National Government, and not upon that of the states. It was so held by this Court in the case of *United States* v. *Cruikshank*, 92 U. S., 542, 553, in which the Chief Justice, in delivering the judgment of the Court, said that the right of the people to keep and bear arms

> "is not a right granted by the Constitution. Neither is it in any manner dependent upon

that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. * * *

In 2 *American Museum*, 1787, p. 428, it is said:

"Where objections were being made to the Constitution, in answer to the objection 'that the militia is to be under the immediate command of Congress; and men conscientiously scrupulous of bearing arms may be compelled to perform military duty,' the answer was made: 'Congress may "provide for calling forth the militia," and "may provide for organizing, arming and disciplining it." But the States respectively can only raise it, and they expressly reserve the right of "appointment of officers and of training it." Now we know that men conscientiously scrupulous, by sect or profession, are not forced to bear arms in any of the States, a pecuniary compensation being accepted in lieu of it. Whatever may be my sentiments on the present state of the matter, is foreign to the point: but it is certain that whatever redress may be wished for or expected can only come from the State Legislature, where, and where only, the dispensing power or enforcing power is in the first instance placed'" (Article 1, Section 8).

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 554, Chief Justice Fuller said:

"Since the opinion in *Marbury* v. *Madison*, 1 Cranch., 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly. 'If,' said Chief

Justice Marshall, 'both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.' And the Chief Justice added that the doctrine 'that courts must close their eyes on the Constitution, and see only the law,' 'would subvert the very foundation of all written constitutions.' *Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.*"

In *Slaughter House* cases, 164 Wallace, at p. 82, the Court said:

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of persons and property—was essential to the perfect working of our complex form of government, and though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that sub-

ject so long as it shall have duties to perform which demand of it a construction of the constitution, or any of its parts."

Chief Justice Bronson, in *Oakley* v. *Aspinwall*, 3 Comst. (N. Y.), 568, said:

> "Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to consideration of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power, some evil to be avoided, some good to be obtained by pushing the powers of the Government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconvenience can be borne long enough to await that process. But if the legislature or the Courts undertake to cure defects, by forced or unnatural construction, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary in enlarging the powers of Government opens the door for another, which will be sure to follow; and so the process goes on until *all* respect for the fundamental law is lost, and the powers of the Government are just what those in authority *please to call them*."

The plea, therefore, of necessity or expediency cannot be taken into consideration in determinating the validity of the statute under examination. The Constitution has created a judicial power in the United States independent in itself, and standing upon the Constitution—whose duty it is to pro-

tect the citizen against unlawful and tyrannical invasions of his private rights.

Story on Const., Sec. 1908:

> "What is to become of constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day? Let us never forget that our constitutions of government are solemn instruments, addressed to the common sense of the people, and designed to fix and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. *They are to speak in the same voice now and forever.* They are of no man's private interpretation. *They are ordained by the will of the people; and can be changed only by the sovereign command of the people.*"

In *re ex parte Milligan*, 4 Wall, page 125, the Court said:

> "This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitions of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or

> how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the Writ of *Habeas Corpus*. * * *
>
> It is insisted that the safety of the country in time of war demands that this broad claim for martial law (in this case before this Court conscription) shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

We can also say, happily, conscription is not necessary in this country. This Court can get the official figures, if necessary, of the number of men in the United States Army and Navy, all volunteers, ready to go anywhere. Happily, we have well organized militia for the repelling of any invasion that may happen. We do not question the high motive of President Wilson and Congress in conscripting, but we do question their power.

In *McCulloch* v. *Maryland*, 4 Wheat., 316, Chief Justice Marshall said:

> "Should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal * * * to say that such act was not the law of the land."

Can it be conceived that the people delegated to the Federal Government a right to conscript men,

when never before in the history of England did the government even claim that right or assume that right?

Amendments Article X specifically says:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

How can it be said the United States can take men of a State, when the Constitution only gives it the right to govern, etc., the militia, and call it into service under certain conditions? An affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended and actually given.

Jefferson in 4 *Jefferson Correspondence*, 373, said:

> "On every question we should carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates and instead of trying what means may be squeezed out of the context or invented against it conform to the probable one in which it was passed."

The people gave what rights they thought necessary to the common defense, and kept what rights they thought necessary as citizens, from "the rights to keep arms" to the right to have a state militia, which shall be called by the National Government only under certain circumstances, and reserving the right to appoint the officers. No right was ever expressly given to force an individual directly to join the army or navy. The militia could be had only when the necessity mentioned in the Constitution

happened, viz.: execute the laws of the Union, suppress insurrections and repel invasions.

The Federalist XXIX by Hamilton:

> "Concerning the militia.
>
> It is therefore with the most evident propriety (on account of uniformity), that the plan of the convention proposes to empower the union 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.* * * * what reasonable cause of apprehension can be inferred from a power in the union to prescribe regulations for the militia, and to command its services when necessary; while the particular states are to have *the sole and exclusive appointment of the officers?* It were possible seriously to indulge a jealousy of the militia, upon any conceivable establishment under the Federal government, the circumstances of the officers being in the appointment of the states, ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia." (The emphasis is Hamilton's.)

The Federalist XLVI, Madison:

> "Let a regular army, fully equipped to the resources of the country, be formed; and let it be entirely at the devotion of the federal government * * *. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, etc. * * *"

Always that distinction. Let the Federal army and the State militia apparently be kept distinct, and the officers of the militia to be chosen *not by the Federal Government.*

Fleming v. *Page*, 9 How., p. 615, Chief Justice Taney said:

> "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. * * *"

And that is why military limitations were placed on Congress, not to allow aggression.

In *Martin* v. *Mott*, 12 Wheat., 29 (1822), Judge Story said:

> "The power thus confided by Congress (to call the militia) to the President, is, doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion."

John Marshall, 3 *Elliot's Debates*, 419, said:

> "The State Governments did not derive their powers from the General Government; but each Government derived its powers from the people and each was to act according to the powers given it. Would any gentleman deny this? He demanded if

powers not given were retained by implication. Could any man say so? Could any man say that this power was not retained by the States, as they had not given it away? For, says he, does not a power remain till it is given away? The State Legislatures had power to command and govern their militia before, and have it still, undeniable, unless there be something in this Constitution that takes it away. *For continental purposes Congress may call forth the militia—as to suppress insurrections and repel invasions.* But the power given to the States by the people is not taken away; for the Constitution does not say so. In the Confederation Congress had this power: but the State Legislatures had it also. * * * The truth is, that when power is given to the General Legislature, if it was in the State Legislature before, both exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the State Governments from it. But there are no negative words here. It rests, therefore, with the States. To me it appears, then, unquestionably that the State Governments can call forth the militia, in case the Constitution should be adopted in the same manner, as they could have done before its adoption. * * * I will show that there could not be a combination, between those who formed the Constitution, to take away this power. All the restraints intended to be laid on the State Governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section of the First Article. This power is not included in the restrictions in that section. But what excludes every possibility of doubt is the last part of it—that 'no State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. When invaded, they can engage in war, as also when in imminent danger.' This clearly proves that the States can use the

> militia when they find it necessary. * * * He then concluded by observing that the power of governing the militia was not vested in the States by implication, because, being possessed of it antecedent to the adoption of the Government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been. And it could not be said that the States derived any powers from that system, but retained them, though not acknowledged in any part of it."

Governor Randolph of Virginia, 3 *Elliot's Debates*, page 400, says:

> "They (the militia) are only to be called out in three cases, and only to be governed by the authority of Congress when in the actual service of the United States; so that their articles of war can no longer operate upon them than when in the actual service of the Union."

Cannot imply powers where specific powers granted.

The Federalist, XXXII, Hamilton:

> "* * * the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union; and in another, prohibited the States from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*."

Nowhere in the Constitutional Convention was conscription ever suggested, mentioned or debated, and Hamilton in all his dreams of a monarchy never thought of that method to establish the next best thing, a strongly centralized government supported by conscripted soldiers, and Hamilton is considered one of the chief authoritative expounders of the Constitution.

Armies were raised under the articles of Confederation merely by requisitions upon the States for quotas of men, and the States raised them by paying bounties to volunteers (Federalist, XXII, Hamilton; see also Memoirs R. H. Lee, Vol. 1, p. 195). Surely Hamilton and Jefferson and the other men who wrote the Constitution, and immediately acted under it, could say what powers over the militia and the army and the States were given to the Federal Government, for they could well use the words quoted in *Steinfeld* v. *Zeckendorf*, 239 U. S., 26: "We know it better than you, for we made it."

In *Ex parte Milligan*, 4 Wall., at page 119, the Court said:

> "Precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. *By that constitution and the laws authorized by it this question must be determined.*"

So say we. The men who made the Constitution were familiar with Blackstone. They understood the English language. The style and clearness of the language of the Constitution is remarkable

There are fewer phrases in it, probably, that are capable of different construction and equivocal interpretations than almost any other legal document that has come before this Court. It therefore does not do to say that they put words into the Constitution without consideration, and without intellectual and industrious selection of the terms which they intended to use, and without intending the clear and definite meaning that the universal practice of mankind at that time imputed to them.

In 4 *Elliot's Debates*, page 459, in a discussion had in the House of Representatives January 12th, 1812, between Mr. Poindexter, Mr. Grundy and Mr. Clay, as to whether the President had the power to employ volunteer militia without the jurisdiction of the United States, Mr. Grundy said he had always understood that in framing the Constitution of this Government there was great jealousy exhibited lest the general government should swallow up the powers of the State governments; and when the power of making war and raising armies was given to Congress, the militia was retained by the States except in cases mentioned by the Constitution.

In a discussion, House of Representatives, December 22nd, 1790, reported in 4 *Elliot's Debates*, 424, in a debate on the militia bill before Congress, Mr. Jackson (a gentleman of superior talents, who had been an active member of the Federal Convention in framing the general Constitution and later one of the Judges of the Supreme Court of the United States; who was likewise a member of the late convention of Pennsylvania; and it is in evidence that he gave his assent to the present Constitution of that State, one article of which declared that persons conscientiously scrupulous of bearing arms shall be exempt from performing militia duty, upon the condition of their paying an equivalent):

> "Is not this a declaration of the sense of the people of Pennsylvania, that they, and they only, had the right to determine exemptions so far as relates to their own citizens? And it is observable that this Constitution has been framed whilst the Federal Government was in full operation. If this privilege belongs to the State, as they have declared it does, why shall Congress attempt to wrest it from them? * * * certainly such conduct must excite alarm and occasion no inconsiderable degree of jealousy. These circumstances and considerations are forcible argument with me to desist."

Mr. Rutherford, House of Representatives, December, 1796, 4 *Elliot's Debates*, 438, said:

> "He believed the Government of the United States had nothing to do with the militia of the several sovereign States. This was his opinion, and it was the opinion of the people at large * * * however, of nine-tenths of them. The Constitution is express upon this subject. It says, when the militia is called into actual service, it shall be under the direction of the general Government, but not until that takes place; the several States shall have command over their own children—their own families. If the United States take it up, they will defeat the end in view—they grasp too much."

Story on the Constitution, Section 462:

> "The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se;* it can never amount by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the pow-

> ers actually conferred by the Constitution and not substantially to create them. For example, the preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measure which they may deem useful for the common defense." (Yet, strangely enough, this objection was urged very strenuously against the adoption of the Constitution, 1 *Elliot's Debates*, 293.) "But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is and ought to be, governed by the intent of the power; if one would promote and the other defeat the common defense, ought not the former, upon the soundest principles of interpretation to be adopted?"

In 2 *Elliot's Debates*, page 97, Mr. Sedgwick says:

> "Is it possible to ask that an army can be raised for the purpose of enslaving themselves and their brethren? Or, if raised whether they could subdue a nation of free men, who know how to prize liberty and who have *arms in their hands?*"

A former Justice of this court called our Constitution "A Fighting Constitution." Yes it is, but a Constitution which says specifically how the fighting shall be done under it and how the forces shall be raised to fight.

Statesmen say that conscription is necessary to show that we are an efficient democracy. But if there are two ways of being efficient, one pointed out by the Constitution and another unauthorized and autocratic, why must the unauthorized and autocratic be selected? It is also said that it might happen that an army could not be raised by volun-

tary enlistment, in which case the power to raise an army would be granted in vain, unless they might be raised by compulsion. If this reasoning could prove anything it would equally show that whenever the legitimate powers of the Constitution should be so badly administered as to cease to answer the great ends intended by them, such new powers may be assumed or usurped, as any existing administration may deem expedient. If it is to be assumed that all powers were granted which might by possibility become necessary, and that Government itself is the judge of this possible necessity, then the powers of the Government are precisely what it chooses they should be.

Debates in the Federal Convention, 5 *Elliot's Debates*, 480, Mr. Sherman moved to amend the clause, giving the Executive the command of the militia, so as to read:

> "And of the militia of the several States, *when called into the actual service of the United States.*"

Six States voted aye, two voted no and three absents.

Debates in the Federal Convention, 5 *Elliot's Debates*, 443, Mr. Ellsworth:

> "It must be vain to ask the States to give the militia out of their hands."

Others expressed the fear of giving full power to the general Government over the militia (5 *Elliot's Debates*, pp. 444, 445, 451-464; also 465, 466; see especially p. 461).

The Constitution was a matter of compromise in many respects. Some wanted a strong centralized

government; others a weak centralized government. The States were jealous of their powers.

Jefferson is alleged to have drafted a conscription law for Virginia. How does that prove that he was of the opinion that the United States had the right to conscript men directly? Jefferson considered among instruments dangerous to the national government a standing army. What would Jefferson have said of the power of the United States to raise a standing army by conscription? To raise an army, if necessary, in war time as well as peace time, of all able bodied men in the United States, wiping out the State militia by taking all the men capable of bearing arms into the United States army and keeping that as a standing army.

Von Holst's Constitutional History of the United States, 1750-1832, pp. 243, 244, 245, gives the history of the denial by the New England States of the power to call forth the militia or to send it outside the border, which question as to who had the authority was finally decided by the Supreme Court in *Martin* v. *Mott*, 12 Wheat., p. 30.

As stated recently by Chief Justice White, in *H. Snowden Marshall* v. *Robert B. Gordan*, U. S. Supreme Court, April 23, 1917:

> "Undoubtedly what went before the adoption of the constitution may be resorted to for the purpose of throwing light on its provisions."

The Supreme Court of the United States, in the case of *Martin* v. *Hunter*, 1 Wheat., R., 304, 325, said:

> "The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically as the preamble of the Constitution de-

> clares, by 'the people of the United States.' There can be no doubt that it was competent for the people to invest the general Government with all the powers which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority."

The IX amendments to the Constitution declares that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Another rule of importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient or impolitic (*United States* v. *Fisher*, 2 Cranch., 358, S. C. Peters Cond. R., 421), because it should never be lost sight of that the Government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, *pro tanto*, the establishment of a new Constitution. It was doing for the people what they have not chosen to do for themselves.

In *Sturges* v. *Crowninshield*, 4 Wheat., 193, the Chief Justice of the United States observed that the powers of the States remain after the adoption of the Constitution of what they were before except so far as they had been abridged by that instrument. The mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power.

Under the clause granting Congress the power "to provide for, organizing, arming and disciplining the militia and for governing such part of them

as may be employed in the service of the United States reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress," it has been held that where Congress does not exercise this power by acting under it the power is concurrent in the States; and that under such circumstances they might act to the utmost extent of sovereignity.

Houston v. *Moore*, 5 Wheat., 1.
Story on the Constitution, Section 1209, and cases cited.

Has Congress the express power or a clear incidental power to resort to conscription for the purpose of replenishing or increasing the regular army? Congress cannot do everything that it may believe for the best interest of the Union. It cannot, for instance, conscript soldiers and quarter them in private houses in times of peace, as well as war. Congress is not the ultimate judge of the extent of its own power. The glory of our institutions is that its acts are subject to review and may be declared void by this Court.

The important reservation of the appointment of all officers and the training of the militia to the States in express terms and the care with which the exigencies were defined in which the militia could be called out shows the jealousy of the framers of the Government of the United States of Federal power. The Governor is Commander-in-Chief of the militia, and the President is under certain specified circumstances made Commander-in-Chief by the following provision: "The President shall be Commander-in-Chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the

United States." The Constitution with the precision which generally characterizes that instrument speaks of the "army and navy of the United States and the militia of the several States." No other militia is known to the Constitution. This clause also draws a wide distinction between the army (regular army) of the United States that is raised by voluntary enlistment and the militia of the several States when called into the actual service of the United States. The President of the United States shall only be Commander-in-Chief of the militia after it is mustered into the actual service of the United States. The militia can only be called out as such.

The militia cannot be called forth as a regular army at all. They may be called as a militia. They cannot be trained and officered in any case except under the authority of the States, nor commanded even by the President except when called forth in the exigencies specified.

The militia, therefore, are not constitutionally subjected to the general and exclusive control of Congress.

The power granted to Congress to raise and support armies does not apply to the militia. This is a distinct and independent power, and has always been so considered.

The States were always insistent as to their rights over the militia, but in the case of *Martin* v. *Mott*, 12 Wheaton, 19, this Court finally determined that the President was Judge as to when the exigency had arisen to call out the militia.

This Draft Act does not purport to be passed for the purpose of calling forth the militia of the States; it denies the right of the States to appoint officers and ignores all State authority (Section Second of Draft Act). It gives to the President full and

arbitrary power to assign for, provide, present to military duty men in any corps, regiment or company he may see fit. It is manifest, therefore, that it is not founded upon and cannot be defended as being authorized by any clause in the Constitution relating to the militia.

Conscription is not intended to re-enforce the militia of the States but the army of the United States. By this law the President is authorized to conscript every male person between twenty-one and thirty years, inclusive (with few exceptions), and consolidate them into one immense United States army to be commanded by Federal officers.

If this law is constitutional, if every able-bodied man in the United States may be conscripted directly into the regular army of the United States for the purpose of fighting on soil outside of the United States and without the consent of the State authorities in what we call a war to make the world safe for democracy, they can also be compelled to do military duty in an aggressive war against a foreign nation. They can be compelled to go to any part of the world to fight. It places the lives and liberties of all at the disposal of Congress. Every soldier may be then compelled to become a soldier for life, or during a war, or during a period of peace, whenever Congress should deem fit to enact such a law. This extraordinary power, it is said, is given to Congress by the grant: "Congress shall have power to raise and support armies."

The power conferred on Congress was the power to raise armies by the ordinary English mode of voluntary enlistments.

The people were justly jealous of standing armies. Hence they took away most of the war power from the executive, where, under monarchical forms, it generally resides, and vested it in the legislative department, in one branch of which the

states have equal representation and the other branch of which the people of the States are directly represented according to their numbers. To these representatives of the States and the people this power of originating war was committed, but even in their hands it was restrained by the limitation of biennial appropriations for the support of the armies they might raise. Of course no army could be raised or supported which did not command popular approbation; and it was rightly considered that voluntary enlistments would never be wanting to recruit the ranks of such an army. The war power, existing only for the protection of the people, and left, as far as it was possible to leave it, in their own hands, was incapable of being used without their consent, and therefore could never languish for enlistments. They would be ready enough to recruit the ranks of any army they deemed necessary to their safety. Thus the theory of the Constitution placed this great power, like all their governmental powers, directly upon the consent of the governed. Equally unjust to their intelligence is it to suppose that they meant to confer on their servants the power to impress them into a war they could not approve.

There is nothing in the history of the Constitution nor in the debates upon it in the conventions, Federal and State, nor in those excellent contemporaneous papers known as the *Federalist*, to justify the suspicion that this vast and dangerous power lies wrapped up in the few plain words of the twelfth clause, but on the contrary, the most indubitable evidence is derivable from all those sources that the thought of subjecting State militia to Federal draft had no existence in the minds of that day. If such a construction had been anticipated, the objections which the Constitution encountered in the State conventions would doubtless have been found insurmountable.

But is this the only check?

Has Congress absolutely unlimited power to raise a regular Federal army by conscription at any time and for any period of time in any manner and for any purpose?

If so, Congress would have the power at any time to impress into military service in the regular army the entire male population capable of bearing arms. It could compel at any time a man to become a soldier in the regular army for life during a war, or for any other period. It could distribute the burden in the most unequal, oppressive, arbitrary and despotic manner, and still its acts would not be liable to the objection that they were not constitutional. Taxation was restricted, the ending of liberty for individuals or states was not. Is that even believable? Congress could raise an army in times of peace, as well as use it in a war of conquest waged against a foreign nation in a distant part of the globe. It could at any time take every man out of a State, no matter for what purpose and against the will of the State authorities, and employ the men so taken for the overthrow of their own State government legally and constitutionally elected. Did the people give that power?

What was the reason for the passage of this grant of power "to raise and support armies"? Congress has exclusive power to declare war and the States are prohibited from engaging in it unless in case of actual invasion or imminent danger thereof. The power to raise armies is an indispensable incident to the power to declare war.

The intention of the framers of the Constitution to be collected by the history and debates of the times seems to have been that the general Government should have power to raise and support a regular standing army which should be officered and trained exclusively by the United States and

kept ready for use at all times and be sufficient for ordinary emergencies which might suddenly arise. Outside of the Civil War, its regular army has never been raised or re-enforced otherwise than by voluntary enlistments. Its organization was based upon a contract between the party enlisting and the United States, to serve as a professional soldier or officer for a certain period of time in consideration of a certain stipulated sum or wages.

But the far-sighted framers of the Constitution did not stop here. They clearly saw that cases might arise in which the regular standing army, raised by contract, might be insufficient. They therefore further enacted that Congress should also have power to provide for calling out the militia in three exigencies, and to provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States under certain restrictions as I have before shown, and to pass all necessary laws to carry this power into effect.

It is a rule of law that the law will judge an instrument which consists of divers parts or clauses by looking at the whole and will give to each its proper office so as to ascertain and carry out the intention of the parties. In construing a part or clause of the Constitution, a whole act and all its parts are to be considered for the purpose of ascertaining and carrying into effect the intention of the framers thereof. The whole context must be considered in endeavoring to collect the intentions of the parties, although the immediate object of the inquiry be the meaning of an isolated clause.

> *Broom's Legal Maxims*, pp. 253, 254, 6 Cranch., 307.

One of the reasons assigned for this rule is that the Constitution is the best expositor of itself, and

hence every part is to be taken into view for the purpose of discovering the mind of the framers, and that the details of one part may contain regulations restricting the extent of general expressions in another part of the same instrument.

Let us now compare the clause "To raise and support armies" with the clauses relating to the militia and see whether from the words or obvious intent of the latter we cannot find out the sense of the framers. The Constitution carefully distinguishes between the army of the United States and militia of the several States; that the President is only Commander-in-Chief over the militia when called into the actual service of the United States; that the militia can only be called out as such; but that Congress has full and unlimited power to call out the militia whenever three specific exigencies exist; to pass all necessary laws to make its call effectual, and to provide even for coercive measures to effect this purpose, with the exception that the States should at all times retain the right to appoint officers and that the President was the sole judge whether any exigencies exist.

Why give this power of calling the militia, with the restrictions attached to it but unfettered by any money limitation while the raising of an army is limited by money appropriations to two years, if the entire authority without any restrictions, not over the militia alone, but over every able-bodied man in the United States, had already been directly delegated to Congress? If this was so, the provisions relating to the militia are worse than useless. They would be mere surplusage and as such would only tend to perplex and bewilder. When the debates in the Federal Conventions upon this very subject are considered and which portray the extreme jealousy on the part of the people about delegating to the general Govern-

ment more military power than was strictly necessary, the framers of the Constitution should have been so extremely reluctant in granting a part of the power which a few moments before they had already granted in full and without limitation. These practical and far-sighted men did not insert two clauses into the Constitution with the intention that they should be mere surplusage, of no force whatever, and which might be disregarded at any time if in construing another clause of the Constitution conferring similar and more ample powers, they should become inconvenient. The framers of the Constitution intended that the Federal Government should have the power to raise and keep a regular standing army to be officered and trained exclusively by the United States and of sufficient size to be adequate for ordinary emergencies, which army should be raised and reinforced from time to time by voluntary enlistments, and that if extraordinary emergencies should arise which they specified, and the regular army should be insufficient for the exigencies, and it should be impossible to strengthen it sufficiently by the ordinary means, that then Congress shall have the power to call out the militia of the States liable to do military duty as an auxiliary force, and pass all necessary laws to make its call effectual, always, however, with the reservation that the State should have the right to appoint the officers. This is as far as I think those who made the Constitution intended to go, and the powers so conferred seem ample enough for any emergency which may arise.

Congress has power to provide and maintain a navy. This power appears to be as unlimited and as general in its terms as the power to raise and support armies, and is even more so because there is no money limitation attached to it. But has it ever been claimed, even in the Civil War, that the

general Government possesses the power to impress men into the naval service? Never. Yet the Constitution does not limit the navy with funds because the navy has never been a danger to the liberty of the people, while large standing armies always have been. Mr. Monroe, who is cited as in favor of conscription for the army, in his instructions to the commissioners at Ghent, proclaimed that: "Impressment is not an American practice, but is utterly repugnant to our Constitution and laws."

One of the amendments to the Constitution which was added for the purpose of further restricting the powers granted in the Constitution provides: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The right of the sovereign State to maintain "a well regulated militia" was universally understood by the framers of the Constitution to be clear and indisputable.

The Conscription Act places every able-bodied man at the disposition of the Federal Government and compels him to go out of the State of New York without the grant and assent of the people of the State of New York, and to serve in the regular army, thus instantly abolishing the entire State Militia, and annulling its organization, and the State of New York is even denied the right to appoint the officers for the drafted men. The actual militia has practically been dissolved by being included in the regular army, and losing its identity. It is no argument to say that the Federal Government will never be driven to the necessity to take all the able-bodied men out of the State, that therefore enough will be left to enable the State to exercise its sovereign right to maintain a well-regulated militia. The question is, has Congress the power to pass a law compelling any man to leave a State at any time

and for any length of time and for any purpose without the consent of the State authorities? If it has, the Federal Government has the power under such law to take all the able-bodied men of a State and make soldiers of them for life to be used for any purpose, thus abolishing the entire State Militia and wiping it out of existence. What other resources for maintaining a well regulated militia besides its able-bodied citizens can a State have? None. Can it be contended that Congress has power to nullify a sovereign right of a State by rendering the exercise of it impossible, thus doing indirectly what it cannot do directly? Why could it not take all the men in the State and leave only the women? Or why could it not take both and force them all to leave the State? If they have the power to take men between the ages of twenty-one to thirty inclusive, they have the power to take all. It would be the most despotic power ever possessed by any despot in history.

Washington is cited as being in favor of conscription. In the War of 1812 Judge Gaston of North Carolina, a strong Federalist, arose in Congress (1814) and denied that Washington favored conscription, and called that power unconstitutional. General Knox, then Secretary of War under Washington, presented a plan, as did other secretaries for his department, in reference to the militia, among other things, advanced the idea of conscription. This was transmitted to Congress by President Washington without any recommendation whatever. It also did not appear that this feature in that report had ever been brought to the notice of the President. Judge Gaston closed his argument with the remark that: "Congress had no more power to raise armies by conscription than it had to provide and maintain a navy by force."

Mr. Monroe did, however, advocate the constitutionality of conscription in 1814. He was Secretary of War at the time. We were engaged in a war with England. *The Government had had hard work to raise money for the purpose of carrying on the war, and, because of it, harder work at times to raise the men*, and therefore the urgent necessities of the country had a great deal of influence over the mind of Mr. Monroe in forming this opinion. At any rate, the idea advanced by Mr. Monroe did not meet with favor and did not receive legislative sanction and was dropped.

Chief Justice Daggett of Connecticut, a jurist of rare ability, arose in the Senate of the United States in November, 1814, and denounced Mr. Monroe's idea of conscription as unconstitutional. A similar speech was delivered in the Senate of the United States in November, 1814, by Jeremiah Mason of New Hampshire, also known as an eminent jurist.

Daniel Webster argued against the proposed conscription during the war of 1812. He delivered his argument on the 8th day of December, 1814. The greatest constitutional lawyer that ever sat in the United States Senate, his arguments are skilled, and carries as much weight and convinces the mind against the Draft Law to-day as it did at that time against a proposed Draft Law. He said:

> "The services of the men to be raised under this act are not limited to those cases in which alone this government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution—'to repel invasion, suppress insurrection, or execute the laws.' But this bill has no limitation in this respect.
>
> This, then, Sir, is a bill for calling out the militia not according to its existing organization, but by draft from new created

classes—not merely for the purpose of repelling invasion, suppressing insurrection, or executing the laws, but for the general objects of war.

What is this, Sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require? * * * Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, at home or abroad, for defense or for invasion, according to the will and pleasure of the government.

Is this, Sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our Constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasures and their own blood a Magna Charta to be slaves.

Where is it written in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it?

Sir, I almost disdain to go to quotations and references to prove that such an abom-

inable doctrine has no foundation in the Constitution of the country. It is enough to know that that instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty. An attempt to maintain this doctrine upon the provisions of the Constitution is an exercise of perverse ingenuity to extract slavery from the substance of a free government. It is an attempt to show, by proof and argument, that we ourselves are subjects of despotism and that we have a right to chains and bondage, firmly secured to us and our children by the provisions of our government. * * * A free Constitution or government is to be construed upon free principles, and every branch of its provisions is to receive such an interpretation as is full of its general spirit. No means are to be taken by implication, which would strike us absurdly if expressed. And what would have been more absurd, than for this Constitution to have said, that to secure the great blessings of liberty it gave to government an uncontrolled power of military conscription? Yet such is the absurdity which it is made to exhibit under the commentary of the Secretary of War.

A compulsory loan is not to be compared, in point of enormity, with a compulsory military service.

If the Secretary of War has proved the right of Congress to enact a law enforcing a draft of men out of the militia into the regular army, he will at any time be able to prove quite as clearly that Congress has power to create a Dictator. The arguments which have helped him in one case, will equally help him in the other. The same reason of a supposed or possible state necessity which is urged now, may be repeated then with equal pertinency and effect.

Sir, in granting Congress the power to raise armies, the people have granted all the

> means which are ordinary and usual, and which are consistent with the liberties and security of the people themselves, and they have granted no others. To talk about the unlimited power of the government over the means to execute its authority, is to hold a language which is true only in regard to despotisms. * * * A free government, with arbitrary means to administer it, is a contradiction; a free government, without adequate provisions for personal security, is an absurdity; a free government with an uncontrolled power of military conscription is a solecism, at once the most ridiculous and abominable that ever entered into the head of man."

It is true press-gangs existed in England as long ago as 1756, but no conscription for a regular standing army existed in England at the time of the Revolutionary War. England hired the Hessians to fight when she wanted more soldiers; she did not conscript her people to cross the ocean. Conscription was not debated in the Constitutional Convention nor by the people at the time of the adopting of the Constitution. Conscription in modern times commenced in 1793, when the first conscription act was passed by the French Chamber.

See *Blackstone Commentaries on Military Service*, and it will be seen that up to 1780, the time of his death, there was no military conscription in England. The only method known at that time to raise a regular army was by voluntary enlistment, and in the United States by requisitions upon the States.

The Constitutional Convention did all in its power to incorporate into our Federal Constitution the English military system, which in 1787 consisted, first, of a regular or "non-constitutional force" made up of a standing army and navy; sec-

ond, of an emergency or "constitutional force" called the militia, a force for national defense that had existed for a thousand years. In the words of the *Ency. Brit.* (9th Ed.):

> "The militia of the United Kingdom consists of a number of officers and men maintained for the purpose of augmenting the military strength of the country in case of imminent national danger or great emergency. In such a contingency the whole or any part of the militia is liable, by proclamation of the sovereign, to be embodied, that is to say, placed in active service within the confines of the United Kingdom."

The county military system, known as the militia, survived the Norman Conquest unimpaired. *Stubbs, Select Charters*, pp. 153-154. By the Great Statute of 1 Edw., Edw. III, c. 5, it was provided that the militia should only be used at home for national defense, "as has been used in times past for the defense of the realm." In 1786, the year before the Federal Convention met, was passed the statute of 26 Geo. III, c. 107, Sec. 95, concerning the militia, in which it was specially provided that "neither the whole nor any part shall be ordered out of Great Britain." Mr. Dicey, one of the most eminent of modern English commentators, says:

> "The militia is the constitutional force existing under the law of the land for the defense of the country. * * * Embodiment indeed converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad" (*The Law of the Constitution*, pp. 287-288).

England never had a military force that could be sent abroad until William the Conqueror brought such a force with him in the feudal host of professional soldiers who accompanied him. It

was the duty of that host, which simply supplemented the ancient constitutional force known as the militia, "to attend the King in war, within and without the realm, mounted and armed, during the regular term of service." But as that regular term of service only lasted for forty days, it led to the device of shield-money, which produced a fund with which the Crown could employ mercenary and professional soldiers who could be kept abroad so long as needed. Out of that purely voluntary system of paid military service was evolved the standing army of England as it existed at the date of the American Revolution; and upon the same general basis rested the standing and professional naval force of England at that time. In order to enable this republic to maintain a standing army and navy like that of England, the Convention of 1787, after giving to Congress the power "to declare war," provided that

> "The Congress shall have power * * * To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces."

Those three provisions, grouped together as a connected whole, relate solely and exclusively to one subject-matter—the creation, maintenance and government of the regular army and navy of the United States, which has always been maintained "by voluntary enlistment."

It is simply impossible to confuse "the regular army" of the United States with that force called by the Supreme Court "the reserved military force or reserved militia of the United States."

Presser v. *Illinois*, 116 U. S., 252.

The militia is a force for national defense that can never be "taken out of the realm" for service in a foreign country. In that sense the term "militia," four times repeated, was embodied in our Federal Constitution.

Ex parte Wells, 18 How., at page 311, stating the rule for deciding the meaning of a word, said:

> "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution. This is in conformity with the principles laid down by this court in *Cathcart* v. *Robinson*, 5 Pet., 264, 280; and in *Flavel's* case, 8 Watts & Sargent, 197."

And in order to put it forever beyond the power of Congress to impair the ancient constitutional exemption from service abroad, the Convention, employing the masterful pen of Gouverneur Morris, provided that the new government, with strictly limited powers, could only organize the national militia for three purposes: "to execute the laws of the Union, suppress insurrections and repel invasions." By those limitations all other uses were expressly excluded with all the force the language can impart. The moment the exemption of the militia from service abroad was thus embodied in the Constitution, Congress was forever deprived of all power over the subject. All military laws up to the present time, except the acts in question, always made the distinction between the regular army and the militia, and this long-continued action of the executive and legislature is some proof as to the proper distinction to be made, and that the services to be rendered by the militia can be required only upon the soil of the United States or of its territories, nor can they be used to enforce public rights abroad.

See also opinion of Attorney-General Wickersham, Opinion A. G., Vol. 29, p. 322, Feb. 17, 1917, and the opinion of Judge Advocate General Crowder rendered to the Secretary of War Dec. 29, 1911.

There is nothing in the Constitution to prevent us from waging the war successfully; the Constitution provides how it is to be done—the regular army and the volunteers to go abroad, the militia to "execute the laws of the Union, suppress insurrections and repel invasions." And the reason it specifically provides with its check and balance how it is to be done is so that no army shall ever be used as an instrument for the establishment of a despotism, the end of every republic in history. The method provided for is sufficient for the common defense.

C1. The Draft Act Destroys State Governments.

Subdivision Seventh, Section 6, of the Draft Act reads as follows:

> "That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or ap-

> pointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; * * * shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year * * *."

This section conscripts state officials, and places them under the military command of the President. It destroys state sovereignties. It makes Governors and state officials direct subordinates of the President, with criminal punishment for disobedience, and in some instances subject to court-martial.

In *Texas* v. *White*, 7 Wall., at page 725, this Court said:

> "The perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. * * *. The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks

> to an indestructible Union, composed of indestructible States."

The fear of the destruction of the State Governments was ever present in the Constitutional Convention, and the framers of the Constitution believed that they had provided sufficient safeguards to prevent the destruction of the State Governments.

In *Texas* v. *White*, *supra*, this Court further said:

> "The Court is bound to know and notice the public history of the nation."

War does not change the status of the State.

In *Ex parte Milligan*, 4 Wall., 118, this Court said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."

The alarms as to the end of liberty of State and individuals, were many, at the time of the adoption of the Constitution, now for the first time they are being realized. Section 6 really places the President, as Commander-in-Chief, above the civil authorities in every part of the Union. It makes all State officials subordinate to him, and makes the President's orders and regulations take precedence over all State laws, and makes the duty of obeying them have priority over the duties of all State officials, including the Governer of the State.

Attorney-General Wickersham (Opinions, A. G., Vol. 29, p. 322), Feb. 17, 1912, stated that:

> "Under our Constitution the military is subordinate and subservient to the civil power."

Republican form of State Government ceases, despite Article IV, Subdivision 4 of the Constitution which reads:

> "The United States shall guarantee to every state in this Union a republican form of government. * * *"

One of the complaints in the Declaration of Independence was:

> "He has affected to render the military independent of and superior to the civil power."

2 *Elliot's Debates*, 359, Governor Clinton:

> "I declare solemnly that I am a friend to a strong and sufficient Government. But, sir, we may err in this extreme; we may erect a system that will destroy the liberties of the people. * * * The people when wearied with their distresses will in the moment of frenzy be guilty of the most imprudent and desperate measures. Because a strong Government was wanted during the late war does it follow that we should now be obliged to accept a dangerous one? I ever lament the feebleness of the Confederation for this reason and no others that the experience of its weakness would one day drive the people into an adoption of a Constitution dangerous to our liberties. I know the people are too apt to vibrate from one extreme to another."

In 2 *Elliot's Debates*, 355, Hamilton said:

> "The States can never lose their powers till the whole people of America are robbed of their liberties. They must go together; they must support each other or meet one common fate. On the gentleman's principle we may safely trust the State Governments, though we have no means of resisting them; but we cannot confide in the National Government, though we have an effectual Constitutional guard against every encroachment. * * *
>
> I imagine I have stated to the committee abundant reasons to prove the entire safety of the State Governments and of the people. I would go into a more minute consideration of the nature of the concurrent jurisdiction and the operation of the laws in relation to revenue, but at present I feel too much indisposed to proceed. * * * I wish the committee to remember that the Constitution under examination is framed upon truly republican principles; and that as it is expressly designed to provide for the common protection and the general welfare of the United States, it must be utterly repugnant to this Constitution to subvert the State Governments or oppress the people."

Where power is delegated exclusively to the United States which requires executive aid to carry the same out, such powers must be executed by the officers of the United States, the Constitution having created that government for that purpose alone, and the same cannot be delegated to State officers, nor can State officers be compelled to carry out the orders.

In our dual form of government there is a division of the powers of government, while the sovereignty which delegates these powers resides in the people.

The Government of the United States is as completely foreign to the State governments as is that of any foreign country, and has no more power in the States and over its officers than any such foreign government. The Draft Act violates this well established rule, and if permitted to stand would lead to endless chaos, conflicts, and to a complete destruction of our constitutional form of government.

It is beyond the powers of both of these governments to interfere with the officers and agents of the other governments when acting within their allotted sphere. That is to say, the State of New York has no power or authority to control the officers of the United States within the limits of their power, or to impose upon them State duties. Nor can the Government of the United States, in the exercise of its constitutional power, delegate to or impose upon State officers the execution of the trusts and duties which by the Constitution are expressly delegated to and imposed upon the Government of the United States and its officers. Therefore, the provisions of the said Act, in attempting to do so, is violative of the Constitution of both the United States and of this State.

In brief, the President of the United States has no legal and constitutional powers to order and control the Governor and officials of New York State, and inflict penalties, than the Governor of the State has to order the President or officials of the United States and inflict penalties upon the persons who do not obey.

State courts that passed on the Draft Law during the Civil War, held that it would be unconstitutional if the Draft Act wiped out State governments or attempted to draft state officials.

In *Jeffers v. Fair*, 33 Ga., 347, the Court, though holding the Draft Law constitutional in the Con-

federate States, specifically holds that the State militia cannot be used in an offensive war on foreign soil, and states further:

> "Nevertheless, if it be true that the exercise of this power as we construe it, would be subversive of the State Governments or might be made so then indeed, is it violative of the spirit of the Constitution."

In *Burroughs* v. *Peyton*, 57 Va., 470, the Court, though holding the Draft Law of the Confederate States constitutional, holds that Confederate Congress has no power to coerce officers of the State Government into the military service of the Confederate States.

This whole point seems almost too plain for argument.

In reference to these state decisions and the decisions of other state courts sustaining conscription in the Civil War, I can only quote what this Court said in *Ex parte Milligan*, 4 Wall., at page 109:

> "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated."

C 2. Draft Act Permits United States Government to Send State Militia (Including Drafted Men) to Europe.

The Conscription Law is unconstitutional because it permits the United States Government to send the National Guard and the drafted men beyond the borders of the United States.

This Court will take judicial notice of the proclamation of the President, that it is the intention of this Government to send to Europe the drafted men and the National Guard to fight Germany, and that the Draft Act mentions the "transportation (when peace is declared) of the forces then serving without the United States."

We inherited the rights of Englishmen. In the declaration drawn up by the Congress of the Nine Colonies assembled at New York, in October, 1765, among which was New York, it is stated: That the colonists "are entitled to all the inherent rights and liberties of his (the king's) natural born subjects within the Kingdom of Great Britain." (*Story on Const.*, Book I, Chap. XVII, Par. 138.)

One of the most important laws and best established principles of personal liberty in England, at the time of the American Revolution, was: That no Englishman could be sent out of the realm without his own consent. William Blackstone, discussing this great fundamental principle in his commentaries, Book I, Par. 137, said:

> "'No power on earth * * * can send any subject of England out of the land against his will; no, not even a criminal."

The words omitted from the quotation are: "except authority of Parliament," and I omitted them because in England the Parliament was and is omnipotent, not limited by any written Constitution. The King himself, even the most arbitrary Tudor, could not lawfully send an Englishman out of the country.

In *Robertson* v. *Baldwin*, 165 U. S., at page 296, Justice Harlan said:

> "The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States."

When the thirteen Colonies were still part of England soldiers and sailors were voluntary hirelings. There was no conscription. Even during the long years of the Napoleonic Wars, lasting for nearly a quarter of a century, Great Britain never conscripted a single soldier. Wellington's victories were the work of volunteers. The French were driven out of Portugal and Spain by volunteers. The victors at Waterloo were volunteers. The conquerors of India, of the Soudan, of Egypt and of South Africa were volunteers. The first 4,000,000 Englishmen, Canadians and Australians who have saved France and England from the conscripted hands of Germany are gallant, patriotic volunteers.

Queen Elizabeth never conscripted a soldier or a sailor, although Spain's army threatened from Holland, and Spain's invincible Armada was sailing up the channel. During the long wars that England waged against the French King, Louis XIV, no law of conscription existed. Even when Napoleon massed his victorious legions at Boulogne, to invade England and the whole of Europe almost held its breath in suspense, England never lost her nerve and never forced a single man to the colors, but while the Parliament of Great Britain is not limited in its power by written terms, and can, therefore, legally resort to conscription, the Government of the United States is the creature of the people, is limited by a written Constitution, and has only the powers delegated to it by the people.

Wherever English subjects were, in land owned by England under the common law, they were subject to English law, and they were protected by it, it was their birthright.

1 *Bl. Comm.*, 107.
Rex v. Vaughan, 4 Burr. R., 2500.
Chitty on Prerog., Ch. 3, p. 29, etc.

The universal principle (*and the practice has* conformed to it) has been that the common law is our birthright and inheritance.

> *Story on Constitution*, 5th Ed., pp. 109, 110.

See also

> 4 *Jefferson's Corresp.*, 178.
> *Jefferson's Works*, VIII, 374.
> *Journal of Congress, Declaration of Rights of Colonies*, Oct. 14, 1774, pp. 27 to 31.
> 1 *Kent's Comm.*, 322.

In the war of 1812 it is well known that American militia refused to cross into Canada because they denied the right of the Government to take them out of their own country against their will. The members of the National Guard in the late Mexican trouble who refused to go voluntarily were not forced even to cross the line into Mexican territory. The construction placed on its power by the Executive Draft of the United States Government in the past is some argument as to what is the proper limit of its power.

(See also Opinion, Attorney-General Wickersham, *supra.*)

Stephen in his *Commentaries on the Laws of England*, 15th Ed., Vol. 2, Chapter 8, gives a history of the military establishments of England from the earliest days. At page 646, Vol. 2, Mr. Stephen sums up the matter thus:

> *"The militia, in whatever county raised, were liable to serve in any part of the United Kingdom, but not abroad, except in the case of men specially volunteered for the purpose.*

> During nearly the last hundred years of its existence the militia was raised by voluntary enlistment, and the compulsory levy by way of ballot remained suspended, at first under annual acts and afterwards under the militia (ballot suspension) act, 1865. What has been said above relates to the force known as the general or regular militia, but there are still on the statute books statutes which provide for the raising of what is known as the local militia, a force raised by ballot in each county and not liable to serve outside the county where raised."

The English idea of the militia is and always has been that it is a body primarily for home defense. It stood somewhere between a police force and the regular army and was expected to preserve the peace and protect the community when the police were not able to do so.

President Jefferson in his annual message December 3, 1805, said:

> "In the meantime you will consider whether it would not be expedient for a state of peace as well as of war so to organize or class the militia as would enable us on any sudden emergency to call for the services of the younger portions unencumbered with the old and those having families."

Writing in explanation of this portion of his message February 26, 1810, to General Kosciusko, Jefferson, referring to his plan to class the militia, said:

> "This would have given us a force of 300,000 young men prepared by proper training for service in any part of the United States, while those who would pass through that period would remain at home liable to be used in their own or adjacent States."

Writing to James Monroe, October 16, 1814, Jefferson said:

> "The objects of our contest being thus entirely changed by England we must prepare for interminable war. To this end we should put our house in order by providing men and money to indefinite extent. The former may be done by classing the militia and assigning each class to the description of duties for which it is fit. It is nonsense to talk of regulars. They are not to be had among a people so cozy and happy at home as ours. We might as well rely on calling down an army of angels from heaven."

If Jefferson had supposed that the power to draft for the regular army was given to the United States by the Constitution, he could never have used that language, for by the exercise of the power of the draft the regular army might at once have been filled to the desired amount, for any time desired.

In the *Slaughter House* case, 16 Wall., at page 115, Judge Bradley (in a dissenting opinion) said:

> "The people of this country brought with them to its shores the rights of Englishmen, the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: 'No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, *or be outlawed or exiled*, or any otherwise destroyed; nor will we pass upon him or condemn him but by lawful judgment of his peers or by the laws of the land.' English constitutional writers expound this article as rendering life, liberty and property inviolable, except by due process of law."

In the case of *Ex parte Coupland*, 26 Texas, 387, on an application for writ of *habeas corpus*, Judge Moore, though holding that the Confederate States could draft, in one part said:

> *"If they are militia they have no constitutional authority to march them beyond our own frontier, because the Constitution has limited the right of the government to demand their services for the purpose of repelling invasion."*

D. It violates Article I, Section 8, Subdivision 12, of the Constitution:

> **"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."**

Why cannot Congress raise one hundred billion dollars by bond issues, payable in thirty years, and use it to sustain a standing army for more than two years? And why could it not continue to do the same in peace time as well as in war time, and thus practically repeal this limitation on its power? The bond issues to support the army are payable in thirty years. No appropriation is made to support the army for a definite time. It was supposed under this clause of the Constitution that the people had practically a recall of the army every two years by electing a new House of Representatives, who only can originate money bills (Art. I, Sec. 7).

Standing armies may prove dangerous to the State, and therefore the Constitution intended to keep the power within the hands of the people by providing that "no appropriation of money to that use shall be for a longer term than two years." Thus, unless the necessary supplies are voted by the representatives of the people every two years, the whole establishment must fall. Congress may, indeed, by an act, disband a standing army at any

time, or vote the supplies only for one year, or for a shorter period, and the army would be automatically disbanded. For, as Napoleon said, "Armies travel on their bellies," and money is needed to supply it. The Constitution is imperative that no appropriation shall prospectively reach beyond the biennial period. It was believed that every human security against the possible abuse of that power was guarded against.

No power of the National Government was at the time of its adoption more strongly assailed by appeals to popular prejudices than that of standing armies. The *Federalist* gave it a most elaborate discussion, as one of the critical points of the Constitution (*The Federalist*, 24 to 29). Up to the present time Congress has restrained its appropriations within constitutional limitations.

In 2 *Elliot's Debates*, page 98, Mr. Dawes says:

> "The army must expire of itself in two years after it shall be raised unless renewed by representatives, who, at that time, will have just come fresh from the body of the people. It will share the same fate as that of a temporary law, which dies at the time mentioned in the act itself unless revived by some future legislation."

In *The Federalist*, XLI, Madison said:

> "Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added."

The Federalist, XXIV (Hamilton):

> "The whole power of raising armies was lodged in the *legislature*, not in the executive; * * * an important qualification even

> of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years. A precaution which, upon a nearer view of it, will appear to be a great and real security against military establishment without evident necessity."

Can Congress expand its own powers? Is the fact that we are at war a repeal of the checks and balances of the Constitution?

Can Congress, because it has the power "to raise and support armies," ignore the balance of the very clause which gives it that power? The clause reads:

> "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

In *The Federalist*, XXVI, Hamilton said:

> "The legislature of the United States will be *obliged*, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department, permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence." (The emphasis is Hamilton's.)

Standing armies have always been held fatal to public rights and political freedom. The right to raise standing armies was bitterly fought, but the limiting of the power by making necessary biennial appropriations removed the opposition. (The *Federalist*, Nos. 24, 25.) The reason being that at the biennial election different representatives could

be elected if the people were dissatisfied with the size of the standing army, and the new Congress could reduce the number. But give the executive unlimited funds, to cover an indefinite time, and even a new Congress cannot reduce the army, and the danger of large standing armies will be upon us, when the Constitution provided definitely against that danger.

E. **It violates Article 4, Section 2, Subdivision 1 of the United States Constitution:**

> **"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."**

It violates Article 5 of the Amendments of the United States Constitution:

> **"No person shall * * * be deprived of life, liberty or property without due process of law."**

This act imposes or permits military, agricultural and industrial service of male citizens, with certain exceptions, thereby excluding the excepted classes and older and younger males than those included between twenty-one and thirty years, inclusive.

The history of civilized man is the history of the insistent conflict between liberty and authority. Each victory for liberty marked a new step in the world's progress; so that we can measure the advance of civilization by the amount of freedom acquired by human institutions. The first great struggle for liberty was in the realm of thought. But the authoritarians protested that freedom of thought would be dangerous; that a few were divinely appointed to think for the people. The power of church and state were arrayed against

the libertarians; but after the sacrifice of many great men and many great women, freedom in thought was won. The second momentous contest was for the liberty to speak. The third contest was for liberty of the press. The state said free speech and free press were dangerous. It was not the duty of citizens to think and speak, but to obey. It was perilous to permit people to speak their minds—they might speak the truth. The fourth struggle was for liberty of assembly. The fifth important contest for liberty was in the field of religion. In these five important spheres of human action there have been against a sea of ignorance and tradition five great victories for freedom. Liberty wherever applied has proved a benefit to humanity; furthermore, the most important steps in human progress would have been impossible without it; and if civilization is to advance, that advance can come only as a result of broader and more complete freedom in all human relations. A principle that has proved its workability in five such important and vital phases of social evolution should prove desirable in all the affairs of man. Even if it should be said that the Government in this case has the legal right, we would reply that at one time men had the legal right to enslave black men, to burn witches and heretics, and to enslave the conquered warriors of an enemy nation. There is no sentiment in legal right; it is the offspring of power only—"Might is right."

Conscription is founded on power, on might; volunteering on justice and freedom. One appeals to the sword and the jail to settle the matter; the other appeals to the conscience, the ideals and judgment of men.

This conscription law is based on a custom of the ages, but justice is a stranger to it.

Volunteering does its own enforcing, conscription needs enforcing.

In the *Slaughter House* cases, 16 Wall., at page 115, in his dissenting opinion, Judge Bradley said:

> "The Declaration of Independence, which was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: 'That all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' * * *
>
> For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; * * *."

Congress has no constitutional power to impose duties on citizens which shall vary according to their age, their health, or their belonging to a well recognized religious sect or organization, as that is not making laws operate on all alike, and under our Government that would not be due process of law.

Our conception of due process of law is that defined by the Chief Justice in *Caldwell* v. *Texas*, 137 U. S., 692, 697:

> "Due process of law is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercises of the powers of government, unrestrained by the established principles of private right and distributive justice."

We do not desire to embarrass the Government in the emergency that now exists; we believe, how-

ever, that the best interest of our Government and of humanity is that liberty shall not cease to live in our midst by establishing conscription.

But irrespective of the constitutional limitations; if Congress has the power to draft, it would necessarily imply that all drafting should be equal, impartial and uniform as to all similarly situated. This principle inheres in the very nature of the Constitution.

When the Constitution was adopted, the people expressed their apprehension that powers not intended to be conferred might be claimed and exercised by the Federal Government. Hamilton argued in the *Federalist* that adequate precautions had been inserted, and that the door had been closed to partiality and oppression; but the people insisted on further specific restrictions upon Congress, and to that end ten amendments were proposed at the first session of the First Congress in March, 1789. The Fifth Amendment, thus adopted, was to restrict the powers of Congress. We contend that this law deprives a man of his liberty and his property, for a man's labor has been held as property, and the draft may deprive him of his life.

The Draft Law denies to all those between twenty-one to thirty years, inclusive, the privileges and immunities given to certain individuals who belong to certain "well recognized religious sect or organization," etc., to exemption.

The purpose of the Fourteenth Amendment was to prevent the States from doing what the United States had been prevented by Article V of the Amendments. No State nor the United States can confiscate corporate or individual property, nor can it regulate it without allowing for a reasonable profit, and yet it is contended that the National Government can confiscate human life, force it to do what it wants, and face death if so ordered.

That an act of Congress permits it or orders it, does not constitute "due process of law," for if it was, then Congress could pass any statute to take private property without compensation, or do anything else merely by passing a law (see Judge Cooley, *Const. Limitations*, Chap. XI, commencing page 132, and citations given).

The mere fact that we are at war does not increase the power of Congress or the National Government, though it may use powers not ordinarily used, like calling for the militia when an invasion is taking place. One of our proud boasts has been that "We are a government of laws, not men."

Men seeking absolute power and assuming to exercise that power because they themselves declare war, must not be allowed, or we will cease to be a government of laws, and becomes a government by men, to whose whim and wish there is no restraint.

The draft is not for the term of the war, but for any time within four months after the President by a public proclamation announces the conclusion of peace. If Congress has the power to say four months, why has it not the power to say four years after a proclamation by the President?

The Draft Law is unconstitutional because it violates the right of an individual to a conscience.

Civil society may be considered as having its foundation in a voluntary consent, social contract, but there are certain rights which the individual does not give up by belonging to society; they arise from the law of nature and are incapable of being transferred or surrendered.

The Declaration of Independence says men

> "are endowed * * * with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted

> among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

Mill on *Liberty* in the introduction said:

> "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling * * *. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. * * *
>
> No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified."

The liberties of the people might in many respects be invaded without the people fearing or being alarmed, but when free speech and free press, and the right peaceably to assemble and petition the Government for the repeal of the Draft Law, and control of one's body and conscience is invaded, then the time has come to seek relief. Under the Constitution this Court was established, with life tenure Judges, for the granting of relief from invasions of liberty. May we not anticipate further evils if this Draft Law is sustained, and judge those

future evils by the badness of the principle that the Government is absolute controller of the body and the conscience of all its citizens? Can we not see the approach of absolute tyranny already?

Story on the Const., Section 301, said:

> "Among the defects (of the Constitution) which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights which would recognize the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property and the pursuit of happiness. It was contended that it was indispensable * * * that the people should have the right to bear arms; that persons conscientiously scrupulous should not be compelled to bear arms * * * that soldiers should not be enlisted, except for a short, limited term. * * *"

Section 303:

> "Many of these objections found their way into the Amendments. * * *"

What is the measure of the rights and duties of government and people?

Are we the absolute slaves of government, as men were once of some church?

How far can the State compel an individual?

How far can it invade his conscience?

Madison in *The Federalist*, XLV, denounced "The impious doctrine in the old world, that the people were made for kings, not kings for the people," and then asks, "Is the same doctrine to be revived in the new, in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of another form?"

Blackstone in his Commentaries said:

> "No laws are binding on the human subject which assault the body or violate the conscience. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs and his reputation."

The Federalist, LI, Hamilton:

> "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels no government would be necessary. If angels were to govern men neither external nor internal controls on government would be necessary."

From the days of the Pharoahs, through Persia and Greece and Rome down to the Reformation, Church and State had absolute right over body and conscience. The Reformation ended the control of the Church. The establishing of this government ended the Divine Right of Kings over the body and conscience of the people. Did we fail and merely substitute a Federal Government for a King with as absolute a right over body and conscience as ever claimed by King or Church? Have we made no advance in the principles of liberty and freedom by the establishment of this government; did we merely change masters?

The whole compass of science was in the Middle Ages subject to restraint; every new opinion was looked upon as dangerous. To affirm the globe we inhabit to be round was deemed heresy, and for asserting its motion the immortal Galileo was con-

fined in the prisons of the Inquisition. In proportion as the world has become more enlightened, this unnatural policy of restraint has retired; the sciences it has entirely abandoned and has taken its last stand on religion and politics.

In *Yick Woo* v. *Hopkins*, 118 U. S., 356, this Court said:

> "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Cooley Const. Limitations, p. 676:

> "Whatever deference the Constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Even in the important matters of bearing arms for the public defense, those who cannot in conscience take part are excused, and their proportion of this great and sometimes imperative burden is borne by the rest of the community."

There are constitutional provisions recognizing conscientious objectors to bearing arms in more than a dozen States.

Richard Henry Lee, one of the delegates in Congress from the State of Virginia, to Edmund Randolph, Governor of said State, said:

> "But what is the power given to this ill constructed body (Senate)? To judge of

> what may be for the general welfare; and such judgments, when made the acts of Congress become the Supreme laws of the land. This seems a power co-extensive with every possible object of human legislation. Yet, there is no restraint; any form of a bill of rights, to secure (what Dr. Blackstone calls) that residuum of human rights which is not intended to be given up to society, and which, indeed, is not necessary to be given for any social purpose. The rights of conscience, the freedom of the press, and the trial by jury, are at mercy" (1 *Elliot's Debates*, 503).

This "residuum of human rights" was intended to be provided by the first Ten Amendments.

We in America deny the statement of Benhardi that "Might makes right." That is the doctrine of the Kings and despotisms of old. It was the doctrine in ancient Egypt and Persia; the doctrine of Caesar and the Roman Empire, Tamerlane and Attila; the Spanish Conquerors of Mexico, Central America and South America and at the worst it was the doctrine of the Czar of Russia.

I know that all society tends to the subordination of the individual to the mass, but the question, fundamentally, is that the best even for the mass? It certainly is not for the individual, it certainly is not for self-realization. Enforced democracy will not bear the fruits of liberty. The Draft Law takes our liberty and our democracy, and says that we are to make the world safe for democracy and that we will have our liberty and democracy returned four months after the war. But suppose the National Government claims the world crisis continues, that nations are continuing large war preparations, and that we must continue the draft as a standing national policy? What then? Who is to decide? If they can do it now un-

der the Constitution, they can do it in peace times. The public men and writers who shouted for conscription are now calling for universal military service, and preparation for war after the war.

The so-called "conscientious objector" to military service may be said to emerge, as a class, for the first time in history in England and in America during the present war. There may have been, it is true, in the past, Quakers and other sects of Christians who accepted literally the commandment, "Thou shalt not kill." But apart from the religious sects mentioned, the men who, from conscientious motives, refused to fight, have not figured, as a class at least, in military history; they were unknown in our Civil War. The conscientious objector is a new portent, and presents a new problem—and perhaps a new hope.

England has imprisoned conscientious objectors, to the number of some 4,000. What does America propose to do? What relief will this Court, as a Court of Justice, give to the conscientious objector?

The complexity and richness of life have permitted the more or less free play of all modes of energy. There are many men best adapted by training and temperament to the performance of physical acts of heroism; there are some men more naturally suited to the performance of intellectual deeds of courage, while yet some others shine in deeds of moral bravery. Why sanction in America the inhuman device of forcing all manner of men into the narrowly specific kind of devotion for which so many of them are hopelessly unfit? Tolerance arises from the existence of varying types of doers, all willing to respect one another's special competence.

Moreover, the one ineradicable fact which no amount of official intimidation can pulverize out of existence is that there is a type of man to whom

(military) participation in war is tantamount to committing murder. He cannot, he will not, commit murder. There is no human power on earth that can coerce him into committing (what he believes to be) the act of murder. You may call him sentimentalist, fool, slacker, mollycoddle—anything "disreputable" you please. But there he is a tremendous fact. Shall he be jailed for his scruples? Shall he be court-martialled or shall his conscientiousness be respected, and he be allowed to go his way in freedom and liberty? That is the question for this Court.

Sooner or later war must cease. The tremendous enterprise of recreating out of bloody chaos some new, reinspired internationalism will be the order of the day. So say all the leading statesmen of the world, including the President of the United States. It would be folly for a groping democracy to permit the degradation, the torture and the jailing of conscientious citizens who have that vision now.

Hasn't our evolving democracy any use for the student, the reflective man, the lonely thinker, the gentle philosopher, the socialist, the disciple of Jesus, the vision-haunted educator, the pity-racked lover of the human kind? Isn't sheer humanity itself a marvelous force for good even in time of war?

The history of the human race moves upward from the days of the absolute right of the head of the family to dispose of the balance of the family in any way whatsoever, even unto killing them, to the right of the chief, and the right of the clan, and the right to slaves by conquest and slaves by birth. Yet all the time the human race is moving upward to absolute freedom of the individual, as long as it does not interfere with another.

The idea that an individual may firmly believe that, though part of a community or a nation, he is also part of the human race, is a sun too bright

at present for most human eyes. Only the eagle in its freedom can look at the sun without blinking its eyes. Only true humans developed to the highest in freedom can bear "the sun of humanity."

The Reformation was a great uprising of the human spirit. It was a mighty response to the new knowledge then flowing in upon men's minds. It was a widening of horizons, a rending of veils, a liberating of the faculties of the soul of man. Whatever our faiths are, we instinctively admire the heroism and sincerity and faith of those who dared to challenge the mightiest power on earth in the name of truth, and to face all penalties with the words that it was right to obey God rather than man. It was a vindication of the majesty of the human conscience. Since then it has been easier for men to stand for what they believe in religion, in politics, in government. Conscientious objectors in numbers to all kinds of tyranny have developed only since the Reformation. Democracy assumes the supremacy of conscience. Our republic is a child of conscientious objectors.

If the conscientious objector (even though he does not belong to a well-recognized church or sect) believes absolutely in the command "Thou shalt not kill," to him there is no higher commanding power. If a man believes it immoral to kill, can Congress by declaring war suspend for this man the moral law as he recognizes it?

The Government may compel him to take his place in the line, but it cannot compel him to pull the trigger or thrust the bayonet. Such a recruit secured by compulsion is at the cost of democracy, and, according to military men, even at the cost of military efficiency.

All democracies, ours included, have tried to develop in its citizens the highest type of conscience, of appreciation of ones highest duty to oneself as

well as the State, and now this Government by this law tries to make them forget a century's teachings and beliefs. Not cowards are the conscientious objectors. It takes more courage to keep faith with conscience in the face of ridicule and scorn and the sneers of the unthinking, than it does to enlist or be conscripted.

If conscience does not count here in America, in what are we better than other tyrannies of history?

History can be, and often is, interpreted from a libertarian point of view. Lord Morley is quoted as saying that as he views human history from the earliest times until now, it appears to him a progress into a greater liberty. John Stuart Mill, in his classic "On Liberty," finds the key to history in the struggle between authoritarian and libertarian forces. Professor J. B. Bury, of Oxford University, published a wonderfully interesting and able book, "A History of Freedom of Thought," in which he developed the same idea.

One of the big sign-posts in the progress of humanity toward fuller freedom is, of course, the Reformation. The four hundredth anniversary of the Reformation was only recently celebrated. Human progress toward a fuller liberty did not stop with the Protestant Reformation, or with the American Revolution, or with the latest of all the revolutions—the Russian Revolution. It will go on forever. Greater liberties are ahead, especially in the civil realm.

To the period of civil liberty that will some day come to pass, it seems to me that pioneers of the type of the truly conscientious objector bear the same relation that pioneers of the type of Huss, Wyclif and Zwingli bore to the Protestant Reformation of the Middle Ages. Huss was burned at the stake, Zwingli was killed, thousands of heretics

were imprisoned and persecuted, yet, in the end, a greater freedom of conscience was won.

Dr. Nicholas Murray Butler, President of Columbia College, who is strongly pro-war, and probably in favor of conscription, in a special article in the *New York Times*, September 23rd, 1917, stated, however, a great truth when he said:

> "To recall to the mind of the twentieth century the significance of the great movement known as the Reformation is valuable public service. The modern mind is threatened, as was the mind of the sixteenth century, with the dominance of a philosophy of life and religion which operates to minimize the function and the freedom of the individual and to make each individual merely a cog in the wheel of a powerful and dominating group. The zeal and the individual's everlasting desire for expression and for responsibility, which were foreshadowed in European history by Saint Dominic and Saint Francis, as well as by Roger Bacon, and which later found such an epoch-making voice in Martin Luther, need to find expression to-day.
>
> The tyranny which threatens the twentieth century is not the tyranny of any church, but the tyranny of a majority in the State, a majority so constituted that it is not content with guiding the ordinary business of Government but which seeks to conform to a single and narrow type the occupation, the gains, the amusements and the modes of living of every individual. If the world needed a religious and philosophical reformation in the sixteenth century in order to emancipate the individual, surely it needs a social and political reformation in the twentieth century for the same purpose."

The very meaning of life, from the base of it to its summit—the something that is the distinguishing mark between the living and the not-living, is freedom or the power of choice between two or more alternatives. The tiniest particle of protoplasm that can just be called living and no more, floats about in water, and has the power of shooting out filaments and seizing any particles within reach that may be turned into nutrition. It has the power of choosing to take them or deciding to reject them, and this power of choice is what constitutes its livingness; without this power it would be dead. The power of choice or self-determination is, therefore, in the beginnings of things, what constitutes the difference between living and non-living matter—and it applies to human beings as well.

To wage war, in the old days of kings and dictators, everything was permissible, or if it was not permissible, the king or dictator had the power, and that ended all objections. Now the same power is claimed for our Government in this country. Have we not advanced since the days of despotism?

In the *Slaughter House* cases, 16 Wall., at page 127, Judge Swayne said:

> "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all such restraints but such as are *justly* imposed by law beyond that line lies the domain of usurpation and tyranny."

The forcing or jailing of conscientious objectors is a violation of individual liberty within its legitimate sphere.

POINT IV.

If Draft Law unconstitutional, there can be no conspiracy to violate it.

> "An unconstitutional law is void and is no law."
> *Ex parte Garborough*, 110 U. S., 651.

Therefore, if the Draft Act is unconstitutional, there could be no conspiracy to violate it and de-defendants' conviction improper.

CONCLUSION.

It is respectfully submitted that the decision of the Court below should be reversed, and the Draft Act declared unconstitutional.

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Supreme Court of the United States

OCTOBER TERM, 1917.

EMMA GOLDMAN and ALEXANDER BERKMAN,
Plaintiffs-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

No. 702.

SUPPLEMENTAL BRIEF.

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702.

Supplemental Brief on Behalf of the Plaintiffs-in-Error.

While the brief for the plaintiffs-in-error and the brief for the defendant-in-error fully covered the law with reference to the question of the unconstitutionality of the Selective Draft Law, neither brief considered in any way the effect of the Fourteenth Amendment to the Constitution, which makes citizens of the States citizens of the United States, and as to whether that Amendment conferred upon the National Government any enlarged powers and the right directly to conscript citizens of the United States.

POINT I.

Conscription is not authorized by the Fourteenth Amendment to the Constitution.

Article XIV, Section 1, reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The purpose behind the adoption of the Fourteenth Amendment was the reversal of the results of the decision in the *Dred Scott* case. The first section of the Amendment, without making any direct reference to the question of race at all, contains a definition of citizenship of the United States.

In the case of *Re Kemmler,* 136 U. S., 436, 448, Chief Justice Fuller said:

> "The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state."

In *Civil Rights Cases,* 109 U. S., at p. 10, Mr. Justice Bradley said:

> "The first section of the Fourteenth Amendment * * * after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the States. * * * It is State action of a particular character that is prohibited."

In *Strauder* v. *Virginia,* 100 U. S., 303, Justice Strong said:

> "This (the Fourteenth Amendment) is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendment, as we said in the *Slaughter House Cases* (16 Wall., 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish."

In *Ex parte Plessy,* 45 La. Ann., 80, the Court said:

> "That Amendment (the Fourteenth), it is well settled, created no new rights whatever, but only extended the operation of existing rights and furnished additional protection for such rights. *Barbier* v. *Connolly,* 113 U. S., 27; *U. S.* v. *Cruikshank,* 92 U. S., 542; *Slaughterhouse Cases,* 16 Wall., 36."
>
> See also, *Van Valkenburg* v. *Brown,* 43 Cal., at p. 47.

In *Story on the Constitution,* 5th Edition, treating of the Fourteenth Amendment, written by T. M. Cooley, Judge Cooley said:

> "Sec. 1943. The purpose of the statute was to give protection of the individual to the United States, not to increase its control.
>
> Sec. 1968. Such are the provisions of the Fourteenth amendment. Important as they unquestionably are, it is nevertheless to be observed that they have not been agreed upon for the purpose of enlarging the sphere of the powers of the general government, or of taking from the states any of those just powers of government which in the original adoption of the constitution were 'reserved to the States respectively.' The existing division of sovereignty, which had been found equal to the preservation of our liberties, not only in times of peace and general harmony but in the trial of a most desperate civil strife, is not disturbed by it. * * * The states, in adopting it, have not struck blindly and fatally at their reserved powers; they have rather given security that in certain important particulars they will not pervert or abuse them."

In a note Judge Cooley further says:

> "The government is not revolutionized by the new amendments to the constitution; it is but adapted to new conditions. The dangerous excresence of slavery has been cut off, and these are but to heal the wound."

The old idea of citizenship, to which justice and liberty were strangers, that a man is a slave of the State, was exploded in 1776, and finally disposed of by the establishment of our National Government. The right of the State to call upon citizens

to repel invasion, suppress insurrection and enforce the laws is our heritage as well as our duty. But even that was limited, as the early history of our colonies and states show, so as not to include "conscientious objectors." (This is more fully developed in my original brief, and *admitted* in the Government's brief.) Our history shows that it was intended in establishing the National Government that wars of aggression should not be fought, and limitations were placed upon the National Government in reference to calling out the militia and limiting appropriations to two years.

We are not weak in the power of self-defense, even if the Selective Draft Act is declared unconstitutional—we should be impotent in the power of aggression and conquest. Our armies have served in all parts of the world and overseas—but always as volunteers. If drafting was made constitutional by the Fourteenth Amendment, some future President, drunk with the desire for power or conquest, could by his own actions force a war, conscript the nation, and the people would be powerless until another election, which might be two or four years later.

Before the Fourteenth Amendment, President Lincoln attempted to justify the Civil War draft under the power to call forth the militia, to suppress insurrection, repel invasion, and enforce the laws of the United States. That Draft Act was never passed upon by this Court. The Government in its brief did not dare, however, to attempt to justify the present Selective Draft Act on the same grounds that President Lincoln attempted to.

Since the Draft Law of the Civil War, the Thirteenth Amendment to the Constitution, against involuntary servitude, has been passed, and, as quoted in the Government's brief, President Lin-

coln said: *"The principle of draft, which simply is involuntary or enforced service, is not new."* So that the Fourteenth Amendment, passed practically at the same period as the Thirteenth Amendment, cannot be even presumed to have repealed the other.

If the Fourteenth Amendment has not enlarged the powers of the National Government, the Selective Draft Law is unconstitutional upon the grounds fully set forth in my original brief.

Respectfully submitted,

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
261 Broadway,
Borough of Manhattan,
City of New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

EMMA GOLDMAN and ALEXANDER BERKMAN,
Plaintiffs-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

No. 702.

PETITION FOR REHEARING

HARRY WEINBERGER,
Attorney for Emma Goldman and
Alexander Berkman,
Plaintiffs-in-Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

EMMA GOLDMAN and ALEXANDER BERKMAN, Plaintiffs-in-Error, against THE UNITED STATES OF AMERICA, Defendant-in-Error.	No. 702.

To the Honorable Supreme Court of the United States:

Now comes Emma Goldman and Alexander Berkman, plaintiffs-in-error, and petition for a limited rehearing in this case, and for grounds of this petition say:

The opinion and judgment of this Court rendered on the 14th day of January, 1918, affirmed the judgment below in this case. The Court, though stating that plaintiffs-in-error were charged with violating Sections 37 and 332 of the Criminal Code and the Selective Draft Law, wholly overlooks and gives no effect in its opinion to Section 332. *There is only one count in the indictment,* and the statutes violated, as stated in the indictment, are "Sections 37 and 332, U. S. C. C., and Section 5 of the Act of May 18, 1917."

Section 332 absolutely requires, for the purpose of a conviction or for the stating of a crime in an indictment, the proof and allegation of the guilt of a principal and the allegation and proof that plaintiffs-in-error were the cause of said guilt. If Section 332 had been omitted, the indictment would have been solely a conspiracy indictment. *But Section 332 was not omitted from the indictment.* Some effect must be given to this section. Ignoring or overlooking Section 332 does not answer the contention of the plaintiffs-in-error in reference thereto, and I respectfully ask that I be allowed to reargue this contention. The calling of the indictment a conspiracy indictment does not make it one.

To properly state the crime in one count, inasmuch as three statutes are alleged to have been violated, the indictment should have read that plaintiffs-in-error conspired to become and did become accessories before the fact, and that the fact did happen that a principal failed to register because of the acts of the plaintiffs-in-error. The indictment should have alleged the person or persons who failed to register. The evidence should have shown it was a fact. The plaintiffs-in-error therefore contend that the indictment does not state an offense and the evidence does not prove the crime charged.

I respectfully submit that the Court in its opinion mistakes my argument entirely, when it states that I contended that a crime of conspiracy is not committed if the illegal end was not accomplished, even if overt acts are proven. I respectfully contend and desire to reargue, so as to show more fully and plainly that the indictment was not a conspiracy indictment but one charging plaintiffs in-error as principals (plaintiffs-in-error being charged as accessories). And it is because of the

fact that the indictment is not a conspiracy indictment that I contend and believe that there must be an accomplishment of the illegal end before the crime can be considered proved or an indictment considered sufficient as an allegation of a violation of Section 332. I believe that this kind of an indictment, with one count, has never been before this Court. I would like, if a rehearing is granted, to fully exhaust the authorities, so that the question may be properly settled by this Court.

I respectfully submit that the Court erred in not considering my contentions concerning the abuse of discretion by the Court below in ruling on an application to postpone the trial, which was not referred to in my assignment of error.

I respectfully submit, when it is considered that the plaintiffs-in-error were immediately sent to prison from the court room at the end of their trial, which was contrary to the unvarying practice in all United States District Courts, and the Trial Judge refused to grant a stay or writ of error pending appeal, so that in order to obtain plaintiffs-in-error's release from prison the application for a writ of error and the filing of the assignments of error had to be done hurriedly and without the stenographic record of the trial, yet the error is so plain and the injustice so great that under the decisions of this Court, which I would fully urge on a reargument, it was the duty of the Supreme Court to consider this apparent error, though not mentioned in the assignment of error (see *Weems* v. *U. S.*, 217 U. S., 349; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S., 547), and to reverse the conviction because of the abuse of discretion by the Court below in refusing an application to postpone the trial in order for plaintiffs-in-error to properly prepare, and because plaintiff-in-error Alexander

Berkman, shown by a doctor's certificate submitted to the Trial Court, was suffering physical agony when forced to trial.

WHEREFORE, I respectfully pray that the petition for a limited rehearing should be granted.

A copy of this petition has been mailed to counsel for the defendant-in-error.

Respectfully submitted,

HARRY WEINBERGER,
Attorney for Emma Goldman and
Alexander Berkman,
Plaintiffs-in-Error.

I hereby certify that in my opinion the foregoing petition is well founded in law and fact and not made for the purpose of delay.

HARRY WEINBERGER,
Attorney for Emma Goldman and
Alexander Berkman,
Plaintiffs-in-Error.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 738.

ALBERT JONES, APPELLANT,

vs.

H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 10, 1917.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 738.

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EAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

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DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1917.

1 *Petition for Writ of Habeas Corpus.*

(Filed August 13, 1917.)

To the Honorable Emory Speer, Judge of the District Court of the United States for the Northeastern Division of the Southern District of Georgia:

The petition of Albert Jones, a resident of McDuffie County, State of Georgia, respectfully represents:

1. That your petitioner is being illegally held and restrained of his liberty, by being confined in the common jail of Richmond County, State of Georgia.

2. That the persons restraining the liberty of your petitioner, Albert Jones, *is* H. W. Perkins, Deputy Marshal of the United States, and M. G. Whittle, Jailer of Richmond County, State of Georgia. The place of detention is at the Common Jail of Richmond County, Georgia. That the cause or pretense of the said restraint of your petitioner, is a warrant issued by C. J. Skinner, Jr., United States Commissioner, for violating the 5th Section of the Conscript Act of May 18th, 1917, for failing to register for military duty as required by said Act. A true and correct copy of said warrant is hereto attached to this petition, marked "Exhibit A," to which reference is prayed as often as the Court may deem proper.

3. That upon the 7th day of August, 1917, the said C. J. Skinner, Jr., United States Commissioner, did issue a final mittimus for the detention of the said Albert Jones, a copy of same is hereto attached and made a part of this petition and marked "Exhibit B," to which reference is prayed as often as the Court may deem proper.

4. Your petitioner further allege- that he is being illegally restrained of his liberty, because,

(*a*) That the said warrant under which your petitioner is being illegally restrained of his liberty and the final mittimus under which your petitioner is being illegally restrained of his liberty, were issued under and by virtue of the Act of Congress approved May 18th, 1917,

entitled an "Act to authorize the President to increase tem-
2 porarily military establishment of the United States Army."

That said Act is unconstitutional and void, and the authority exercised by virtue of it, is illegal and void, because, the said Act contravenes the Thirteenth Amendment to the Constitution of the United States, adopted in 1865, which said amendment declares, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

(*b*) That your petitioner has not been accused of any crime by virtue of said Act, but, that he is held for military duty and service,

which service he is unwilling to perform and undergo and which service is therefore compulsory and exerted over your petitioner against his will by authority of said Act of Congress.

(c) That your petitioner is a free citizen of the United States and of the State of Georgia, and is —— years old, and that he has not forfeited his freedom as a citizen of the United States or of the State of Georgia, in any way known to the laws of the United States or of the State of Georgia, prior to the said Act of Congress or since the said act of Congress was passed and is therefore being held in involuntary servitude under said Act of Congress and not for any reason other than that whatever.

(d) That it is the right of your petitioner, under the Common Law, to remain within the Realm of the United States as a free citizen of the said United States and of the State of Georgia, and not to be sent out of the Realm without his consent, which is now attempting to be done.

(e) That your petitioner is now being detained illegally in the manner and form herein set forth for the purpose of being sent beyond the seas outside of the United States or any territory thereof to do military duty in Europe.

(f) That such forcible expulsion or banishment of your petitioner from his native land without his consent and against his will, violates his natural rights as a citizen of the United States and your petitioner is entitled to the protection of his rights under the Statutory Law, the Constitution of the United States and the Common Law.

3 (g) That your petitioner is being deprived of his liberty "without due process of law," in that, he is being forced to give up all of his rights as an American free born citizen, to do military service without his consent and against his will.

Wherefore, your petitioner alleges that his restraint is illegal and without regard to his legal and constitutional rights, as above set forth, and prays that Your Honor issue the writ of Habeas Corpus directed to H. W. Perkins, Deputy Marshal of the United States, and M. G. Whittle, Jailor of Richmond County, Georgia, requiring them to bring your petitioner before your Honor at the time and place to be specified in the writ, for the purpose of examining into the cause of your petitioner's detention.

ALBERT JONES.

GEORGIA.
Richmond County:

Personally appeared before me an officer duly authorized by law to administer oaths, Albert Jones, who after being duly sworn deposes and says, that the facts stated and set forth in the above and foregoing petition are true.

ALBERT JONES.

Sworn to and subscribed to before me this the 9th day of August, 1917.

C. J. SKINNER, JR.,
U. S. Commissioner.

4 EXHIBIT "A."

Warrant to Apprehend.

The President of the United States of America to the Marshal of the United States for the Southern District of Georgia, and to his Deputies, or any or either of them:

Whereas, S. N. Allred, Special Agent, has made complaint in writing under oath before me, the undersigned, a United States Commissioner, for the Southern District of Georgia, Northeastern Division, charging that Albert Jones, late of McDuffie County, in the State of Georgia, did, on or about the 5th day of June, A. D. 1917, at Thomson, R. F. D. #4, in said District, in violation of Section 5 of the Act of May 18th, 1917, unlawfully fail to register for military duty as required by said Act, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America;

Now, Therefore, You are Hereby Commanded, in the name of the President of the United States of America, to apprehend the said Albert Jones, wherever found in your District, and bring his body forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 3rd day of August, A. D. 1917.

[SEAL.] C. J. SKINNER, JR.,
United States Commissioner as Aforesaid.

Marshal's Return.

Received this warrant on the 4th day of August, 1917, at Augusta, Ga., and executed the same by arresting the within named Albert Jones at 3 mi. West of Mesena, on the 4th day of August, 1917, and have his body now in Court as within I am commanded.

J. S. DAVIS,
U. S. Marshal, So. District of Ga.
Per H. W. PERKINS,
Deputy.

August 4th, 1917.

5 EXHIBIT "B."

Final Mittimus.

The President of the United States of America to the Marshal of the Southern District of Georgia and to the Keeper of the Jail of Richmond County, in the State of Georgia, Greeting:

Whereas, Albert Jones has been arrested upon the oath of S. N. Allred, Special Agent, for having, on or about the 5th day of June, 1917, in said District, in Violation of Section 5 of the Act of May 18th, 1917, unlawfully failed to register for military duty as required by said Act; And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Albert Jones, committed said offense as charged, I have directed that said Albert Jones be held to bail in the sum of $1,000.00, to appear at the first day of the next term of the District Court of the United States for the Southern District of Georgia, Northeastern Division, at Augusta, and from time to time thereafter to which the case may be continued and he having failed to give the required bail;

Now, These are Therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Albert Jones to the Custody of the Keeper of the said Jail of Richmond County, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of the Jail of said County, to receive the said Albert Jones, prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereunto set my hand and seal at my office in said District, this the 7th day of August, A. D., 1917.

[SEAL.] C. J. SKINNER, JR.,
United States Commissioner for said Southern District of Georgia, Northeastern Division.

6 *Jailor's Receipt for Prisoner.*

Received from J. S. Davis, United States Marshal, the body of the within named Albert Jones, for safe keeping, pursuant to the within writ. This August 7, 1917.

M. G. WHITTLE,
Jailor Richmond County.

Marshal's Return on Commitment.

Received this Mittimus with the within named Prisoner, on the 7th day of August, A. D., 1917, and on the same day I committed the said Prisoner to the custody of the Jail Keeper named in said

Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated August 7th, 1917.

J. S. DAVIS,
United States Marshal, Southern District of Ga.,
By H. W. PERKINS, *Deputy.*

Mittimus issued and filed August 7th, 1917.
Returned and entered August 7th, 1917.

C. J. SKINNER, JR.,
United States Commissioner.

7 *Return of Service of Petition for Writ of Habeas Corpus.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Macon, Bibb County, Georgia, within my district, on August 14th, 1917, I personally served the within Petition, Order and Rule to Show Cause, upon the within named E. M. Donalson, United States Attorney for the Southern District of Georgia, by handing to him a copy hereof, and at the same time exhibiting to him this Original.

The Return of J. S. DAVIS,
United States Marshal,
By JOHN C. HECKLE,
Office Deputy.

Dated at Macon, Ga., this August 14, 1917.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Augusta, Richmond County, Georgia, within my district, on August 18, 1917, I personally served the within Petition, Order and Rule to Show Cause, upon the within named M. G. Whittle, Jailor of Richmond County, Georgia, by handing to him a copy hereof, and at the same time exhibiting to him this Original.

The Return of JOSEPH S. DAVIS,
U. S. Marshal,
By H. W. PERKINS,
Deputy.

Dated at Augusta, Ga., this August 18, 1917.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Augusta, Richmond County, Georgia, within the Southern District of Georgia, on August 17, 1917, I personally served the within Petition, Order and Rule to show cause, upon the within

named H. W. Perkins, Deputy U. S. Marshal, by handing to him copy hereof, and at the same time exhibiting to him this Origin

C. J. SKINNER, JR.,
P. O. Augusta, Ga.

Dated at Augusta, Ga., this August 17, 1917.

8 *Order and Rule to Show Cause.*

(Entered and Filed August 13, 1917.)

MT. AIRY, GA., August 10th, 1917.

The application herein having been made to Emory Speer, Judg
It is ordered, that the persons named as holding the applicant in c
tody be and they are hereby ordered to show cause before me at t
above stated place on Saturday, August the 18th, 1917, at 11 a. m
why the writ sought herein should not be granted.

Ordered further, that the respondents be served with a copy of t
application and this order, and that the United States Attorney f
the Southern District of Georgia be also served forthwith.

EMORY SPEER, *Judge.*

9 *Answer of Respondents to Petition for Writ of Habeas Corp*

(Filed August 16, 1917.)

In the District Court of the United States for the Northeaste
Division of the Southern District of Georgia.

ALBERT JONES

vs.

H. W. PERKINS, Deputy U. S. Marshal; M. G. WHITTLE, Jailor
Richmond County, Georgia.

Now come the respondents in the above stated case and make t
their answer to the petition for Writ of Habeas Corpus, and cert
to the Court as follows:

I.

Respondents deny the allegations of the first paragraph of
petition.

II.

Respondents admit that the said Albert Jones is now confined
the common jail of Richmond County, Georgia, under a warra

issued by C. J. Skinner, Jr., United States Commissioner for said District, for a violation of Section Five of an Act of Congress, entitled, "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States", approved May 18th, 1917, and respondents say that the detention of said Albert Jones is in every respect legal.

III.

Respondents admit that, on the seventh day of August, 1917, the said C. J. Skinner, Jr., United States Commissioner, did issue a final mittimus for the detention of the said Albert Jones, and that the copy of said mittimus, attached to the petition in this case, is true and correct.

10 IV.

Respondents deny that the petitioner, Albert Jones, is being illegally restrained of his liberty, as set forth in the fourth paragraph of plaintiff's petition; but, to the contrary, say that the Act of Congress, referred to therein, is in every respect constitutional and valid, and not in contravention of the Thirteenth Amendment of the Constitution of the United States, or any other part of the Constitution.

And now, having fully answered and complied in all respects with the order of this Honorable Court, your respondents pray that the Writ of Habeas Corpus be denied, and that a judgment be rendered against the plaintiff in this case for all costs.

E. M. DONALSON,
Attorney for Respondents.

GEORGIA,
Richmond County:

Personally appeared before the undersigned an officer duly authorized to administer oaths, H. W. Perkins and M. G. Whittle, who being duly sworn say, that they have read the answer filed in their behalf as respondents in the above stated case, and that the same is true, as they verily believe.

H. W. PERKINS.
M. G. WHITTLE.

Sworn to and subscribed before me this August 17, 1917.

C. J. SKINNER, JR.,
Deputy Clerk U. S. Court.

11 *Order Denying Writ of Habeas Corpus.*

(Entered and Filed Sept. 8, 1917.)

In the District Court of the United States for the Northeastern Division of the Southern District of Georgia.

In re ALBERT JONES and JOHN STORY.

Application for Writs of Habeas Corpus.

The petitions for habeas corpus in these causes having been presented to the undersigned at Mt. Airy, Georgia, and having been assigned for trial on August 18th at said place, and counsel for the relators and for the respondents, the Sheriff of Richmond County and the Deputy Marshal of the United States, represented by the United States Attorney for the Southern District of Georgia, having been fully heard, and the Court having taken time for advisement, it is now on the 20th day of August, 1917, by the Court Ordered that the writs of habeas corpus sought in the above stated applications, they both having been heard together, be and the same are hereby denied.

This 20th day of August, A. D., 1917.

EMORY SPEER,
Judge.

12 *Opinion of the Court.*

(Filed September 22nd, 1917.)

In the District Court of the United States for the Northeastern Division of the Southern District of Georgia.

Petition for Habeas Corpus.

JOHN STORY

vs.

H. W. PERKINS, Deputy U. S. Marshal, and M. G. WHITTLE, Jailor.

Petition for Habeas Corpus.

ALBERT JONES

vs.

H. W. PERKINS, Deputy U. S. Marshal, and M. G. WHITTLE, Jailor.

J. Gordon Jones, Attorney for John Story and Albert Jones.
Erle M. Donalson, U. S. Attorney, for Defendants.

Decided August 20th, 1917, at Mt. Airy, Ga.

SPEER, *Judge:*

Albert Jones and John Story imprisoned in the Richmond County jail under commitment for unlawfully failing to register for military duty as required by the Act of Congress of May 18th, 1917, known popularly as the Selective Draft law, have made application for writs of habeas corpus. They allege that their imprisonment is unlawful. They charge that the enactment, made to raise a national army, is violative of the Constitution of the United States. It is insisted that the authority exercised by the United States under this legislation is void because the Act contravenes the 13th Amendment. This provides that "neither slavery nor involuntary servitude except as punishment for crime whereof the parties shall
13 have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." To agree to this contention we must conclude that a soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill and courage is, and must be committed the task of maintaining the very existence of the nation and all that its people hold dear. The Grand Army of the Republic, the Confederate Veterans and the Sons of Veterans are not maintained to

preserve the traditions of slavery. Nations do not pension slaves, to commemorate their valor. They do not "Give in charge their names to the sweet lyre"; nor does

> "Sculpture in her turn
> Give bond in stone and ever-during brass
> To guard and to immortalize the trust."

The sole additional ground of the petition is, that by the Common Law it was the right of petitioners to "remain within the realm," and that this right should now be held to relieve them from military service beyond the borders of the United States. The reply is, that the Common law, that is the immemorial English law, can not prevail as to the United States, or its people, against the explicit provision of an Act of Congress. Nor has a Court of the United States power to declare an Act of Congress invalid because it is inimical to the Common Law. The touchstone for such judicial power is the Constitution and nothing else. It remains to be determined whether the Constitution has conferred authority on Congress to enact this law. Clause 11 of Article 1, Section 8 of the Constitution empowers Congress "to raise and support armies." This power is plenary. It is not restricted in any manner. Congress may summon to its army thus authorized every citizen of the United States. Since it may summon all, it may summon any. Said the Supreme Court in the case of The United States vs. Tarble, 13th Wallace, 408, "Among the powers assigned to the national government, is the power to raise and support armies * * * Its control over the subject is plenary and exclusive. It can determine without question from any states authority how the army shall
11 be raised, whether by voluntary enlistment or forced draft, the age at which the soldiers shall be received and the period for which they shall be taken; the compensation he shall be allowed, and the service to which he shall be assigned."

It is urged that by this legislation, Congress has taken over and in this way conscripted the National Guard. This, it is said is the State Militia. It is contended under clause 14 of the Article and Section above quoted that such militia can be used only to execute the laws of the Union to suppress insurrection and repel invasion. Since the petitioners are not members of the National Guard, in no event could their rights in this way be affected. But the National army is not the militia. "An army is a body of men whose business is war." Burroughs vs. Peyton, 16 Gratt, Virginia, 475. The militia is, "A body of men composed of citizens occupied temporally in the pursuit of civil life, but organized by discipline and drill, and called into the field for temporary military service when the exigencies of the country require it." Idem.

As we have seen, Congress in the exercise of the power to raise armies may summons to the colors every citizen. It follows that the States even if they so desire, cannot defeat this power, by enlisting such citizens in the State troops or National Guard. Was this

possible, it would be also possible for the States to prevent altogether the raising of armies by Congress.

There remains to be considered the contention that Congress cannot employ the National Army to be created by virtue of this legislation in foreign lands or beyond the seas. If this is true, then indeed, is our country impotent. Then must its people indeed suffer in their own homes, in their cities and on their farms, all the horrors of invasive war. Its military leaders must ignore the settled principles of their science, that the best defensive is the most vigorous offensive. The keen swords of its sons instead of flashing over the guard of the enemy and piercing his vitals, must be held immovable as if on an anvil to be shattered by the reiterated blows of his hammer. Deprived of our aid in the field, successive defeat will visit and crush our allies. Their lands conquered, their natives taken, we must then in turn, solitary and alone, meet on our own soil the impact of victorious and barbarous legions whose laws do not forbid them service abroad, but which inspire their fierce and veteran armies to deeds of conquest in every clime.

Was this contention maintainable, the misguided men who for their personal ease advance it, might all too late discover their fatal error. They would discover it in the flaming homesteads, in the devastated fields, in murdered brethren, in outraged wives and daughters; in their lands, their factories, their merchandise; their stock, their all, coolly appropriated by the conqueror, as his own; their institutions destroyed; homeless, landless and beggars to spend whatever interval of degraded life remains to them in abject slavery to the conqueror. But our organic law does not so shackle the gigantic energies of the great Republic. After the enumeration of the powers of Congress, among them as we have seen, "the power to raise and support armies," in Clause 17 of Article 1, Section 8, it provides the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Here is the great reservoir of power to save the national existence.

It is said that there is no express power to send armies beyond the sea. True; but there is no express power to enact the criminal laws of the United States; none to convey the public domain, to build transcontinental railroad, nor to construct the Isthmian Canal; nor to create the Interstate Commerce Commission; nor to declare the Monroe Doctrine; nor to make the Louisiana Purchase; nor to buy Alaska, or to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective army will be created under the law here assailed, "to provide for common defence." And beyond and above all, is the inherent power of every nation however organized to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the Scourge of God. The writs are denied.

16 *Petition for Appeal.*

(Filed September 19, 1917.)

In the District Court of the United States for the Northeastern Division of the Southern District of Georgia.

No. 77.

ALBERT JONES, Petitioner,

vs.

H. W. PERKINS, Deputy United States Marshal, and M. G. WHITTLE, Jailor of Richmond County, Georgia.

Application for Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable Emory Speer, Judge of the District Court of the above-stated District:

The above named petitioner, Albert Jones, shows that the District Court of the United States for the Southern District of Georgia, on the 20th day of August, A. D., 1917, entered an order in the above stated case, denying and refusing to issue the writ of habeas corpus prayed for by your petitioner.

And your said petitioner, Albert Jones, feeling aggrieved by said order so rendered and entered as aforesaid, and conceiving that in said order and the entry thereof and in the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of your petitioner, all of which will more fully appear in the assignment of errors filed with this petition, doth appeal from said order to the Supreme Court of the United States, and prays that this his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, *to* be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of said Court in such cases made and provided.

This the 17th day of September, A. D., 1917.

J. GORDON JONES,
Attorney for Petitioner.

17 *Order Allowing Appeal.*

(Entered and Filed September 19th, 1917.)

In the District Court of the United States for the Northeastern Division of the Southern District of Georgia.

No. 77.

ALBERT JONES, Petitioner,

vs.

H. W. PERKINS, Deputy United States Marshal; M. G. WHITTLE, Jailor of Richmond County, Georgia.

Application for Writ of Habeas Corpus.

Order Allowing Appeal.

On motion of Thomas E. Watson, J. Gordon Jones and L. D. McGregor, Esquires, solicitors and counsel for complainant, it is hereby ordered, that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimonies, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $250.00, to be approved by C. J. Skinner, Jr., as Deputy Clerk, but that the judgment of the Court is in no way superseded.

Dated this the 17th day of September, A. D., 1917.

EMORY SPEER, *Judge.*

18 *Assignment of Errors.*

(Filed September 19, 1917.)

In the District Court of the United States for the Southern District of Georgia.

No. 77.

ALBERT JONES, Appellant,

vs.

H. W. PERKINS, Deputy United States Marshal; M. G. WHITTLE, Jailor of Richmond County, Georgia.

Application for Writ of Habeas Corpus.

Assignment of Errors.

Now comes Albert Jones, appellant in the above entitled cause, and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 20th day of August, A. D., 1917.

First.

That the United States District Court for the Southern District of Georgia, erred in refusing and denying the writ of habeas corpus sought by appellant.

Second.

That the United States District Court for the Southern District of Georgia, erred in sustaining the constitutionality of the Act of Congress approved May 18th, 1917, entitled an "Act to authorize the President of the United States to increase temporarily military establishment of the United States", and in not adjudging said Act of Congress void and unconstitutional because the same contravenes the Thirteenth (13) Amendment to the Constitution of the United States, which declares "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

19 Third.

Because the United States District Court for the Southern District of Georgia, erred in holding appellant's detention legal, because appellant was unwilling to perform and undergo compulsory military service under the aforesaid Act of Congress, of May 18th, 1917.

Fourth.

Because the United States District Court, for the Southern District of Georgia, erred in holding that compulsory military service under the aforesaid Act of Congress, of May 18th, 1917, was not, and is not "involuntary servitude" within the intent and meaning of the Thirteenth (13) Amendment to the Constitution of the United States.

Fifth.

Because the United States District Court for the Southern District of Georgia, erred in holding that appellant, contrary to his common law rights, as citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States, under the terms of the Act of Congress aforesaid of May 18th, 1917.

Sixth.

Because the United States District Court for the Southern District of Georgia, erred in denying appellant's rights as a free citizen of the United States to remain at large with the full enjoyment of his personal liberty within the territorial limits of the United States, the Act of Congress aforesaid of May 18th, 1917, to the contrary notwithstanding.

Seventh.

Because the United States District Court for the Southern District of Georgia, erred in holding that appellant has and has not been deprived of his liberty "without due process of law."

20 Wherefore, the appellant prays that said order be reversed and that said District Court for the Southern District of Georgia, be ordered to enter a judgment reversing the decision of the lower Court in said proceedings.

J. GORDON JONES,
Attorney for Appel-ant.

P. O. Address, Cordele, Ga.

21 *Appeal Bond.*

(Filed September 19, 1917.)

In the District Court of the United States for the Southern District of Georgia.

No. 77.

ALBERT JONES, Petitioner,

vs.

H. W. PERKINS, Deputy Marshal of the United States, and M. G. WHITTLE, Jailor of Richmond County, Georgia, Respondents.

Application for Writ of Habeas Corpus.

Know all men by these presents, that we, Albert Jones, as Principal, and W. W. Ramsey, of the County of Richmond, Georgia, and G. W. Legwen, of the County of Richmond, Georgia, as Sureties, are held and firmly bound unto H. W. Perkins, Deputy Marshal of the United States, and M. G. Whittle, Jailor of Richmond County, Georgia, in the sum of Two Hundred and Fifty Dollars ($250.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this the 19th day of September, A. D. 1917.

Whereas, the above named Albert Jones has prosecuted an appeal to the Supreme Court of the United States to reverse the order and judgment of the District Court of the United States for the Southern District of Georgia, in the above entitled cause;

Now Therefore, the condition of this obligation is such that if the above named Albert Jones shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

ALBERT JONES. [L. S.]
Principal.
GLENN W. LEGWEN. [L. S.]
Surety.
W. W. RAMSEY. [L. S.]
Surety.

22 UNITED STATES OF AMERICA,
State of Georgia, County of Richmond, ss:

On the 19th day of September, 1917, personally appeared before me the persons described in and who executed duly the foregoing instrument as the parties thereto, and who, to-wit, Albert Jones, W. W. Ramsey and G. W. Legwen, are respectively known to me to be the parties who executed the same and who are described therein, and respectively acknowledged, each for himself, that they executed the same as of their free will and act and deed for the purpose therein set forth,

And the said W. W. Ramsey and G. W. Legwen, being respectively by me sworn, says, each for himself, and not one for the other, that he to-wit, W. W. Ramsey, is a resident and householder of the County of Richmond, Georgia, and he, to-wit, G. W. Legwin, is a resident and householder of the County of Richmond, Georgia, and that he, W. W. Ramsey, is worth the sum of $20,000.00 Dollars, over and above his just debts and legal liabilities and property exempt from execution; and that he, G. W. Legwen, is worth the sum of $10,000.00 Dollars, over and above his debts and legal liability and property exempt from execution.

ALBERT JONES.
GLENN W. LEGWEN.
W. W. RAMSEY.

Subscribed and sworn to before me this the 19th day of September, A. D. 1917.

[SEAL.]

C. J. SKINNER, JR.,
Deputy Clerk of the United States Court.

Under and by virtue of an order passed by the Honorable Emory Speer, Judge of the District Court of the United States for the Southern District of the State of Georgia, issued and signed upon the 17th day of September, A. D. 1917, requiring the undersigned to approve the bond in the above and foregoing case, I, C. J. Skinner, Jr., Deputy Clerk of the United States Court, do hereby approve the within bond both as to sufficiency and form. This the 19th day of September, A. D. 1917.

[SEAL.]

C. J. SKINNER, JR.,
Deputy Clerk of the United States Court for the Southern District of Georgia.

23 *Citation on Appeal.*

(Filed September 19, 1917.)

In the District Court of the United States for the Southern District of Georgia.

No. 77.

ALBERT JONES, Petitioner,

vs.

H. W. PERKINS, Deputy United States Marshal, and M. G. WHITTLE, Jailor of Richmond County, Georgia, Respondents.

Application for Writ of Habeas Corpus.

United States of America to H. W. Perkins, Deputy Marshal of the United States, and M. G. Whittle, Jailor of Richmond County, and E. M. Donalson, Esq., United States Attorney for the Southern District of Georgia:

You and each of you, are cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the first day of October, A. D. 1917, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of Georgia, from a final order signed, filed and entered on the 20th day of August, A. D. 1917, in that certain cause (same being an application for writ of habeas corpus), No. 77, wherein Albert Jones, is petitioner and you are defendants and appellees, to show cause if any there be, why the order refusing and denying issuance of the writ of habeas corpus applied for rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Emory Speer, United States District Judge for the Southern District of Georgia, this the 17th day of September, A. D. 1917, and of the Independence of the United States of America the one hundred and forty-second year.

EMORY SPEER,
U. S. District Judge for the Southern District of Georgia.

24 *Acknowledgment of Service on Citation.*

Service of the within citation acknowledged this 20th day of September, 1917.

E. M. DONALSON,
U. S. Attorney.

Service of the within citation acknowledged this 20th day of September, 1917.

H. W. PERKINS,
Deputy U. S. Marshal.

Service of the within citation acknowledged this 20th day of September, 1917.

M. G. WHITTLE,
Jailor Richmond Co., Ga.

25 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia,
Northeastern Division, ss:

I, Cook Clayton, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the above and foregoing contains a full, true and correct copy of the record, the assignment of errors, and all other papers and proceedings, as directed by law to be made, necessary in the hearing of the appeal of the relator, in the case lately pending in said Court, numbered Seventy-Seven on the Common Law Docket of said Court, entitled, Albert Jones, Petitioner, versus H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond County, Georgia, respondents, as the same remains on file and of record in my said office, at Augusta, in said District.

Witness my official signature and the seal of said Court affixed at Augusta, in said District, this the 29th day of September, in the year of our Lord one thousand nine hundred and seventeen.

[Seal U. S. District Court, So. Dist. of Georgia.]

COOK CLAYTON,
Clerk,
By C. J. SKINNER, JR.,
Deputy Clerk.

Endorsed on cover: File No. 26,205. S. Georgia D. C. U. S. Term No. 738. Albert Jones, appellant, vs. H. W. Perkins, deputy United States marshal, and M. G. Whittle, jailor of Richmond County, Georgia. Filed October 10th, 1917. File No. 26,205.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ALBERT JONES, APPELLANT,
v.
H. W. PERKINS, DEPUTY UNITED STATES Marshal, etc.
No. 738.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, appearing on behalf of appellee, and respectfully moves the court to advance the above-entitled cause and set it down for hearing with Nos. 656, 663, 664, 665, 666, 680, 681, and 702, heretofore advanced and set for hearing on Monday, December 10, 1917.

This is another of the cases known as the "Selective Draft Law" cases.

Appellant petitioned the District Court of the United States for the Southern District of Georgia for a writ of *habeas corpus* on the ground that his commitment to prison for failing to register in accordance with the act of May 18, 1917, commonly known as the "selective draft law," was unlawful

in that said act is unconstitutional. The petition was denied.

Prompt enforcement of the criminal provisions of the law involved and the administration of the provisions governing the drafting and assembling of the Army are reasons for requesting the determination of this case at the same time as the others hereinbefore mentioned.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1917.

○

FILE COPY

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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 738.

ALBERT JONES, APPELLANT,

vs.

H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLANT.

J. GORDON JONES,
Counsel for Appellant.
THOMAS E. WATSON,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 738.

ALBERT JONES, APPELLANT,

vs.

H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of the Case.

Albert Jones, appellant, was arrested under and by virtue of a warrant issued by C. J. Skinner, United States Commissioner, at Augusta, Georgia, charging failure to register

law

for military duty, violation of section (5) of the act of May 18, 1917, known as the "Selective Draft Act," August 4, 1917, by H. W. Perkins, Deputy United States Marshal for the Southern District of Georgia, Northeastern Division (Record, page 3). Appellant was committed to the common jail of Richmond County, Georgia, in default of bond in the sum of $1,000 (Record, page 4). Appellant presented on August 10, 1917, his petition before Hon. Emory Speer, Judge of the District Court of the United States for the Southern District of Georgia, praying for the issuance of writ of *habeas corpus*, alleging:

(*a*) That he was being illegally held and restrained of his liberty by being confined in the common jail of Richmond County, Georgia.

(*b*) That the persons restraining him of his liberty are H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond County, Georgia. That the cause or pretense of his restraint being charges set forth in the warrant issued against him charging violation of section (5) of the "Conscript Act" of May 18, 1917, for failing to register for military duty as required by said act.

(*c*) That said act is unconstitutional and that the authority exercised by virtue of it is illegal and void, because the said act contravenes the 13th Amendment to the Constitution of the United States adopted in 1865, which amendment declares "Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place, subject to their jurisdiction."

(*d*) That he has not been accused of any crime by virtue of said act, but that he is held for military duty and service, which service he is unwilling to perform and undergo, and which service is, therefore, compulsory, and that he is restrained of his liberty against his will by virtue of said act.

(*e*) That he is a free citizen of the United States, and of the State of Georgia, and that he has not forfeited his

freedom as a citizen of the United States, or of the State of Georgia, in any way known to the laws of the United States, or of the State of Georgia, prior to the act of Congress, or since the said act of Congress, to wit: "The act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, was passed, and is therefore being held in involuntary servitude under said act of Congress, and not for any reason other than that whatever.

(*f*) That it is his right, under the common law, to remain within the realm of the United States as a free citizen.

(*g*) That he is now being detained illegally in the manner and form set forth for the purpose of being *sent beyond the seas outside of the United States, or any territory thereof, to do military duty in Europe.*

(*h*) That such forcible expulsion or banishment of him (appellant) from his native land, without his consent and against his will, violates his natural rights as a citizen of the United States, and he is entitled to the protection of his rights under the statutory law, the Constitution of the United States, and the common law.

(*i*) That he is being deprived of his liberty "without due process of law" and that he is being forced to give up all of his rights as an American free-born citizen to do military service without his consent.

(*j*) That he is restrained, illegally and without regard to his legal and constitutional rights, etc. (Record, pages 1 and 2.)

(*k*) On August 10, 1917, Hon. Emory Speer, Judge of United States Court, Southern District of Georgia, granted Order Nisi directing and commanding the persons holding appellant in custody to show cause on the 18th day of August, 1917, why a writ of *habeas corpus* should not issue. (Record, page 6.)

(*l*) On August 16, 1917, H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond

County, Georgia (appellees), by Hon. E. M. Donaldson, United States Attorney for the Southern District of Georgia, filed their answer to the petition of appellant in which denial is made of the first paragraph "that your petitioner is being illegally held and restrained of his liberty by being confined in the common jail of Richmond County, Georgia," of appellant's petition and admitting all other allegations contained in appellant's petition except that he is being illegally restrained of his liberty, which is denied by respondents, and asserting that the act of Congress referred to is constitutional and valid, and not in contravention of the Thirteenth (13th) Amendment of the Constitution of the United States or any part of the Constitution, and pray that the writ of *habeas corpus* be denied. (Record, pages 6 and 7.)

(*m*) That on August 20, 1917, Hon. Emory Speer, Judge of the United States Court for the Southern District of Georgia, rendered judgment in said cause denying the issuance of the writ of *habeas corpus*. (Record, pages 8, 9, 10 and 11.)

(*n*) On September 17, 1917, petition for an appeal was allowed and bond assessed in the sum of $250.00 by the trial judge. (Record, pages 12 and 13.)

(*o*) On September 19, 1917, assignment of error, bond and citation on appeal and acknowledgment of service were filed. (Record, pages 16, 17 and 18.)

Therefore, under section 238, Judicial Code, 36 Stat. at L., 1957, Comp. St., 1911, page 228 Supp., F. S. A., 231, this being a proceeding for issuance of writ of *habeas corpus*, there can be no difficulty about the right of appellant to appeal direct to this court.

Assignments of Error.

The assignments of error are set out on pages 14 and 15 of the record and are seven in number.

(First.)

That the United States District Court for the Southern District of Georgia erred in refusing and denying the writ of *habeas corpus* sought by appellant.

(Second.)

That the United States District Court for the Southern District of Georgia erred in sustaining the constitutionality of the act of Congress approved May 18, 1917, entitled an "Act to authorize the President of the United States to increase temporarily the military establishment of the United States," and in not adjudging said act of Congress void and unconstitutional because the same contravenes the Thirteenth (13th) Amendment to the Constitution of the United States, which declares "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

(Third.)

Because the United States District Court for the Southern District of Georgia erred in holding appellant's detention legal, because appellant was unwilling to perform and undergo compulsory military service under the aforesaid act of Congress of May 18, 1917.

(Fourth.)

Because the United States District Court for the Southern District of Georgia erred in holding that compulsory mili-

tary service under the aforesaid act of Congress of May 18, 1917, was not, and is not "involuntary servitude" within the intent and meaning of the Thirteenth (13th) Amendment to the Constitution of the United States.

(Fifth.)

Because the United States District Court for the Southern District of Georgia erred in holding that appellant, contrary to his common-law rights as a citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States, under the terms of the act of Congress aforesaid of May 18, 1917.

(Sixth.)

Because the United States District Court for the Southern District of Georgia erred in denying appellant's rights as a free citizen of the United States to remain at large with the full enjoyment of his personal liberty within the territorial limits of the United States, the act of Congress of May 18, 1917, to the contrary notwithstanding.

(Seventh.)

Because the United States District Court for the Southern District of Georgia erred in holding that appellant has not been deprived of his liberty "without due process of law."

Wherefore, the appellant prays that said order be reversed and that said District Court for the Southern District of Georgia, be ordered to enter a judgment reversing the decision of the lower court in said proceedings.

ASSIGNMENTS OF ERROR.

First and Third Assignments of Error.

Appellant contends that the act of May 18, 1917, known as the "Act to authorize the President to increase temporarily the military establishment of the United States"—"Selective Draft Act"—is void and unconstitutional and that his detention thereunder for compulsory military service was, and is, illegal; therefore, it was an error of the court to refuse and deny the issuance of the writ of *habeas corpus* as prayed for.

Vide authorities cited under other assignments of error herein.

Second Assignment of Error.

> "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place, subject to their jurisdiction" (Article 13, section (1), Constitution of the United States).

Mr. Justice Hughes, delivering the opinion of the court in the case of Alonzo Bailey *vs.* State of Alabama in declaring the meaning, force, and effect of the Thirteenth (13th) Amendment of the Constitution of the United States, used the following language: "The language of the Thirteenth (13th) Amendment was not new. It reproduces the historic words of the Ordinance of 1787 for the government of the northwest territory, and gave them unrestricted application within the United States, and all places subject to their jurisdiction, while the important concern was with African slavery and amendment was not limited to that. It was the Charter of Universal Civil Freedom for all persons of what-

ever race, color, or estate, under the flag. The words "universal servitude" have a larger meaning than slavery. "It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English Government, or by reducing the slaves to the condition of serfs." The plain intention was to abolish slavery of whatever name and form, and all its badges and intents; to render impossible any state of bondage; to make liberty free; by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude. While the amendment was self-executed, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As was said in the Civil Rights Cases: "By its own unaided force and effect it abolished slavery and established universal freedom, while legislation made necessary and proper to meet all of the various cases and circumstances to be affected by, and to prescribe proper modes of restraint primarily and direct in its character; for the amendment is not a mere prohibition of said laws establishing or upholding slavery, but an absolute declaration that slavery and involuntary servitude shall not exist in any part of the United States."

Bailey *vs.* State of Alabama, 219 U. S., 219, page 55; L. Ed., 191; Slaughterhouse Cases, 16 Wall., 69; 21 L. Ed., 406; 109 U. S., 20; 27 L. Ed., 842; 3 Sup. Ct. Rep., 18.

Mr. Justice Bradley, in construing the Thirteenth (13th) Amendment in the Civil Rights Cases, used this language: "This amendment, as well as the Fourteenth (14th), is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery and established universal freedom."

Mr. Justice Brown, in construing the Thirteenth (13th) Amendment in Plessey *vs.* Furguson, 163 U. S., 537, 542; 41 L. Ed., 256-7, used the following language: "That it does not conflict with the Thirteenth Amendment which abolishes slavery and involuntary servitude except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the Slaughter-house Cases to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery of whatever class or name."

Clyatt *vs.* United States, 197 U. S., 207; 49 L. Ed., 729, 730; 16 Wall., 36; 21 L. Ed., 394; 109 U. S., 320-23; 27 L. Ed., 835, 842, 843; 3 Sup. Ct. Rep., 18, 28-30.

Fourth Assignment of Error.

Appellant contends that the fourth assignment of error is well taken; and refers to the authorities cited "*supra*" to support the second assignment of error as applicable also to the fourth assignment of error.

Fifth, Sixth, Seventh Assignments of Error.

Appellant contends that the fifth, sixth, and seventh assignments of error are well taken.

(A) The act of Congress in question violates appellant's *natural rights.*

"The rights which are declared to be natural and inalienable, whose protection is guaranteed by the several constitutions are such rights as are personal to the individual as a citizen of a free community, civil as distinguished from political, and belonging alike to every man, woman, and child; they include the right of personal liberty, the right of personal security."

State *vs.* Williams, 68 Conn., 131; 35 A., 24, 421; 48 L. R. A., 465.

Pratt *vs.* Breckinridge, 112 Ky., 1, 27; 65 S. W., 136.

Natural rights as guaranteed by the several constitutions "are to be construed in every jurisdiction with reference to what was considered the natural rights of men under the common law which existed at the adoption of the Constitution."

Beebe *vs.* State, 6 Ind., 501; 63 Am. D., 391.

Mayo *vs.* Wilson, 1 N. H., 53.

Henley *vs.* State, 98 Tenn., 655; 41 S. W., 352, 1104; 39 L. R. A., 126.

"The natural rights of a person at common law are the rights of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property."

1 Bl. Com., 129.

Kosciolek *vs.* Portland R., etc., Co., 81 Or., 517; 160 P., 132.

Adoption of the common law of England by constitutional provision includes the adoption of these guaranties of life, liberty and property which were contained in Magna Charta and the other great Charters of English freedom.

Peo. *vs.* Priest, 206 N. Y., 274; 99 N. E., 547 (aff. 150 App. Div., 19; 133 N. Y. S., 1087).

"The mere statement of such guaranties in constitution is a prohibition by necessary implication of legislation inconsistent therewith, and renders such legislation void."

State *vs.* Phelps, 144 Wis., 1; 128 N. W., 1041; 35 L. R. A., N. S., 353.

(B) The act of Congress in question violates appellant's *civil and political rights.*

"The civil rights are those which are accorded to every member of a district, community, or nation."

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681; see also Civil Rights, 1.

They include natural rights,

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681.

but are to be distinguished from political rights, which are those exercisable in the administration of government.

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681.

Political rights conferred by the Constitution, however, may not be infringed by the legislature.

Gemmer *vs.* State, 163 Ind., 150; 71 N. E., 478; 66 L. R. A., 82.

Kenneweg *vs.* Allegany County, 102 Md., 119; 62 A., 249.

Stein *vs.* Marks, 44 Misc., 140; 89 N. Y. S., 921; 15 N. Y. Ann. Cas., 155.

State *vs.* Phelps, 144 Wis., 1; 128 N. W., 1041; 35 L. R. A., N. S., 353.

The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person to

whatsoever place one's inclination may direct without any restraint except by due process of law.

Crandall *vs.* Nevada, 6 Wall., 35; 18 L. Ed., 744, 745 (rev. 1, Nev., 294).

Arkansas *vs.* Kansas, etc., Coal Co., 95 Fed., 353 (rev. on other grounds, 183 U. S., 185; 22 S. Ct., 47; 46 L. Ed., 144).

Elkinson *vs.* Deliesseline, 8 F. Cas. No. 4336; Brunn. Coll. Cas., 431; 2 Wheel, Cr., 56.

"'The word "liberty" as used in the Constitution of the United States, and the several States, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interests, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment.

"'The liberty mentioned is deemed to embrace the rights of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned,' per Harrison, J., in Young *vs.* Com., 101 Va., 853, 862, 45 S. E., 327."

"Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade

or avocation. Per Earl, J., in *In re* Jacobs, 98 N. Y., 98, 103; 50 Am. R., 636 (quot. Ives *vs.* South Buffalo R. Co., 94 N. E., 431; 34 L. R. A., N. S., 162; Ann. Cas. 191, B., 156 (Rev. 140 App. Div., 921; 125 N. Y. S., 1125; 68 Misc., 643; 124 N. Y. S., 920."

"All statutes and municipal ordinances which infringe on the liberty of the individual, as that term is used in constitutional guarantees, are unconstitutional and void."

Mobile *vs.* Orr, 181 Ala., 308; 61 S., 920; 45 L. R. A., 575 (ordinance).

Montgomery *vs.* Kelly, 142 Ala., 552; 38 S., 67; 70 L. R. A., 209.

State *vs.* Dalton, 22 R. I., 77; 46 A., 234; 84 Am. S. R., 818; 48 L. R. A., 775.

(C) Because said act of Congress creates a system of "involuntary servitude" which deprives appellant of his rights as a citizen of the United States.

By the Thirteenth Amendment of the Constitution of the United States it is provided that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The leading purpose of this amendment was to effect the abolition of African slavery in the United States.

Civil Rights Cases, 109 U. S., 3; 3 Sct., 18; 27 L. Ed., 835.

Butchers' Benev. Assoc. *vs.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.), 36; 21 L. Ed., 394; *Ex p.* Drayton, 153 Fed., 986; *Ex p.* Riggins, 134 Fed., 404 (rev. on other grounds, 199 U. S., 547; 26 Sct., 147; 50 L. Ed., 303).

But the addition of the words "involuntary servitude" to the prohibition of the amendment gave it a broader scope, *and it has been applied to any servitude in fact involuntary*, no matter under what form such servitude may have been disguised.

Butler *vs.* Perry, 240 U. S., 328, 332; 36 Sct., 258; 60 L. Ed., 672.

Thus it has been held to apply to slave customs prevailing among the uncivilized tribes of Alaska;

In re Sah Quah, 31 Fed., 327;

to involuntary servitude under the guise of an apprenticeship.

In re Turner, 24 F. Cas. No. 14,247; 1 Abb. (U. S.), 94, 87;

and to render void all statutes or contracts providing for a state of peonage, such as has existed in Chica, in Mexico, and portions of the United States acquired from Mexico.

Bailey *vs.* Alabama, *supra.*

And more recently under statutes of various States of the Union.

Bailey *vs.* Alabama, *supra*, 12 C. J., 934, 935, 936.

ARGUMENT.

Counsel for appellant closes this brief by adopting the able, timely, and comprehensive argument made in the trial below by Thomas E. Watson, Esq., leading counsel in this case in the court below.

> "In the great and well-known work generally called 'De Tocqueville's Democracy in America,' the learned author says:
>
> " 'The peace, the prosperity and the very existence of the Union are invested in the hands of the seven judges'—meaning the judges of the United States Supreme Court. 'Without their active co-operation, the Constitution would be a dead letter; the Executive appeals to them for assistance against the encroachments of the legislative powers; the legislature demands their protection from the designs of the Executive; they defend the Union from the disobedience of the States; the States from the exaggerated claims of the Union, the public interest against the interests of the private citizen, and the conservative spirit of order against the fleeting innovations of democracy. * * * They are all-powerful guardians of a people which respects law * * *.
>
> " 'The President, who exercises a limited power, may err without causing great mischief in the States. Congress may decide amiss, without destroying the Union, because the electoral body, in which Congress originates, may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent men, or bad citizens, the Union may be plunged into anarchy or civil war.
>
> " 'The real cause of this danger, however, does not lie in the constitution of the tribunal—the Supreme

Court—*but in the very nature of Federal governments.*'

"The important substance of the great Frenchman's statements in these paragraphs is: that Federal governments are peculiar, each being distinguishable from the other, by the nature of its written compact of organization, and all of them being different from such a government as that of Great Britain, for instance, which is not the result of any constitutional convention or sudden act of social communities desiring to set up a government, but the result, on the contrary, of the slow growth of principles and institutions.

"The political literature of England is full of allusions to what are called 'the principles of the British Constitution,' but as everybody knows, Great Britain has no constitution in the sense that the Swiss Confederation has one, or that the existing French Republic has one, or that the United States of North America have one.

"It consequently follows, that in deciding any question arising under the Constitution of the United States, arguments drawn from history and historical analogies are almost worthless, and often misleading.

"The very existence of the Supreme Court of the United States implies that the President may overstep his official powers; that Congress may usurp an authority not delegated to it by the States, and that the States themselves may either trench upon Federal authority, or be illegally invaded by it.

"The question before the court, as we most respectfully submit, reduces itself to this: Has Congress the right to assume that the Constitution is automatically suspended, when Congress declares that a state of war exists?

"In other words: Has Congress the right to de-

clare that a condition of facts, alleged by Congress to be in existence, authorizes Congress to expand its own powers, and to exercise unlimited authority, *by a majority vote, to dispose of the lives, the liberty and the property of citizens without due process of law?*

"For example: Is it within the power of Congress, by a majority vote declaring that a state of war exists, to set up a system of religion, to abolish freedom of worship, to forbid peaceable assemblage and petition, and to require that every citizen publishing a book submit the same, in advance, to official censors, who can forbid its publication, as was done in Great Britain and Europe during the time of John Milton?

"Is it possible for Congress (in the exercising of its constitutional power to raise armies) to nullify the second half of the sentence in which this power is delegated, and, instead of limiting war appropriations for two years, as the Constitution demands, extend those appropriations for thirty years?

"Can Congress emasculate the Supreme Law, by enforcing one-half of a sentence of it, and nullify the other half?

"Is it within the power of Congress, by first declaring that a state of war exists, to abolish free speech, and to enlarge the constitutional definition of treason as to embrace whatever other offences Congress may see fit to classify as treason?

"During the time of our great and most deplorable Civil War, this Supreme Judicial Tribunal was brave enough to denounce as illegal the action of the Lincoln administration in suspending the writ of *Habeas Corpus.*

"There was a Federal judge in New Orleans, in

1815, who was brave enough to arrest Andrew Jackson at the head of his victorious army.

"Against the arbitrary and despotic conduct of Gen. Jackson, the United States court asserted the civil authority vested in the judiciary and fined the conquering hero a thousand dollars, for his contempt of court, and his violation of the civil rights of a civilian.

"In Lord Rosebery's fascinating book, 'Napoleon, the Last Phase,' it is stated that the Admiral in command of the British navy, had to resort to ruses—the secret shifting of Napoleon from boat to another—to prevent the civil officers of one of the courts from making service of the writ of *habeas corpus*, the purpose being to have the great prisoner brought before English judges, in order that they might determine whether or not his sentence to life-long exile was legal, in view of the well-known fact that he had voluntarily come aboard a British man-of-war, off a French port, had surrendered himself, and had claimed for himself the protection of English law.

"The military autocrats and Tory oligarchs, who at that time ruled Great Britain, and had been for so many years waging war upon French democratic principles were absolutely afraid to allow Napoleon Bonaparte to appear before one of the higher courts of England to plead against the arbitrary measure of military depotism.

"Let us hope that this spirit of judicial independence will never become extinct.

"Let us hope that life-tenure judges will always be what our ancestors intended them to be, and that not even an Aaron Burr can be given such a bad name by those in power, that a John Marshall or Roger B. Taney will not always be found, who will interpose the protection of the law—refusing to alter

the Constitution of the Union, to please any President whomsoever, although the President be Thomas Jefferson.

"Does not the Army Increase Act of May 18, 1917, make a new departure from any legislation heretofore known in this Republic?

"Citizens of selected ages are required to register for military service, and are subjected to pains and penalties if they refuse to perform this new duty.

"Having registered, they become automatically (according to the proclamation of General Crowder) soldiers not by enlistment, not by being actually mustered in, but from the mere act of signing their names, they become soldiers of the United States, subject to be court-martialed and shot, if they fail to afterwards appear for physical examination and enrollment.

"By this automatic process, they become amenable to military orders, to serve at home and abroad.

"By this automatic process, they become liable to be assigned for duty at manual labor in mines, factories, and fields.

"The President of the United States, in one of his proclamations this year, made the statement, in almost those exact words.

"He said that those registered Americans, those conscripts—if we may be allowed to call them so—can, by the will of the President, be assigned to manual labor; in the various branches of industry if the necessities of the war, as judged by the President, require it.

"Again, under this act of May, 1917, section three, the entire civil establishments of all the States are swept away, so far as any independence of theirs is concerned.

"*Every officer of the State is conscripted and placed under military command of the President.*

"From Governor down to bailiff, the States' representatives become a portion of the National Army, and must perform, at the command of the President, such duties as he sees fit to impose upon them.

"So far as we know, Germany alone adopts and practices this system. We learn from the Memoirs of ex-Ambassador Gerard that immediately after the declaration of war in Berlin (1914) the military machine assumed control of civil officers and made the civilian official a portion of the war machine.

"Again, the act of Congress under consideration authorizes the President to do what the Constitution expressly forbids, namely, it authorizes him to merge the State Militia with the National Army.

"By another proclamation which the President issued in July, 1917, the National Guard (State Militia) was fused with the Federal Army and made subject to the same orders, regardless of the constitutional provision, which limits the national use of State troops to the repelling of invasion, the suppression of insurrection, and the enforcement of our laws.

"Is it possible to ignore the fact that this new act of Congress of May, 1917, treats the Constitution of the United States as having been made a dead letter—a scrap of paper—by the previous declaration of Congress, that 'a state of war existed'?

"Let us see whether the new acts of Congress ignore and violate the Constitution.

"We submit that they do so when they disobey the constitutional prohibition against military appropriations for more than two years.

"Second. When they ignore the constitutional limitation of the use of the State Militia by the Federal Government.

"Third. When they place it within the power of the President to not only inject the State troops into the Federal Army, but to send those State troops into foreign countries for military service, regardless of the willingness of the State troops to be used in such service.

"Fourth. When they make the Conscription Act so broad that the President can divide the conscripts as he may deem best, into soldiers, miners, mill hands, and farm workers.

"Fifth. When the entire Republican form of government of the States is temporarily abolished and the State placed under martial law, subject to the military commands of the President.

"Sixth. When the citizens are compelled, without regard to their circumstances and wishes, to enroll themselves for military duty, the purpose being to send them into foreign countries to take part in a war which the people at large have never in any way approved, and into which our citizens are unwilling to go.

"(The purpose of the Conscription Act and of the following acts of Congress, as well as the speeches, addresses, and proclamations of the President, and the loans floated upon the country by the Government, are so well known and are of such a public character that we respectfully request the court to take judicial cognizance of them.)

"There is no thought in my mind—nor has there ever been—of comparing a soldier to a slave. I have not any more thought of doing that than I have had of indulging in a stump speech on this terribly important question.

"What I do say, and most earnestly insist upon, is that Congress, in passing the act of May 18, 1917, has violated the Thirteenth Amendment as well as the

Fifth, because that amendment not only guaranteed to the recently emancipated black people—the special subject of the amendment—but guaranteed to him, as well as to all others, his perfect immunity from any source of involuntary servitude.

"In express terms the Constitution gives Congress the power to build post roads; but has any lawyer ever contended that Congress can build such roads with forced labor?

"To enroll the citizen who is at work, say, on the farm, and assign him to work in the factory, by military order, as the President says he can do under this act, would certainly be involuntary servitude, whenever the farmer is unwilling to be assigned. So with those thousands and tens of thousands whom the President said he might assign to involuntary labor in mines and in fields.

"The system of government created by our forefathers in the making of the Constitution under which we now live was necessarily complex, because the sovereign powers which were exerting themselves through the delegates at Philadelphia to create a central government were independent States, each of whom was proud and jealous of its sovereignty. The small States feared to go into a union without adequate protection from the large States, hence Delaware, Rhode Island, and Georgia wanted equality in the Federal Council with Virginia, New York, and Pennsylvania. To adjust this difference our Senate was made as it is.

"Again, there was the question of slavery, and upon that, also, as everybody knows, another compromise had to be reached.

"But there was also a question of jealousy which was common to all the States, as against the new central power which was about to be organized under the new Constitution.

"The little State might be ever so much afraid of the preponderating selfishness of the big State; the free States might be ever so much opposed to the political influence of enslaved negroes in the National Council; but there was one fear that overshadowed all others, and it was felt in New York and Virginia perhaps even more keenly than in North Carolina and in Maryland, and that fear was that the Central Government would gradually encroach upon the States, usurping first one power and then another, until those separate sovereign States would be reduced to the condition of mere subject-provinces, ruled arbitrarily by the Federal Government.

"As all students know, this question occupied more time in the debates on the adoption of the Constitution than any other discussion which it aroused.

"All those who are familiar with 'The Federalist' know how earnestly James Madison and Alexander Hamilton argued and pleaded to allay the fears of the people upon this subject.

"Again and again, in 'The Federalist,' we find these great statesmen asserting that there could never be any danger to our liberties and to what were once called States' Rights, because of the growth of a Federal military.

"These statesmen argued, contended, and quoted from the Constitution itself those clauses which forbid military appropriations for more than two years; which forbid the merging of the State troops with the Federal army; which reserved the State militia for State purposes, excepting those three cases mentioned, and which provided that the appointment of the officers of the State militia shall always remain with the Governors of the States. Mr. Hamilton especially laid great stress upon this point, the substance of his argument being *that the State would*

always have controlling influence over the State troops, because of the fact that the officers would always owe their appointment to the State.

"In No. 24 of 'The Federalist' Mr. Hamilton says that if a stranger to our politics were to read the newspapers of that day he would suppose that the power of raising and maintaining armies rested with the Executive, whereas, if he were to read the Constitution itself, he would see that the whole power of raising armies was lodged in the legislature, not in the Executive, and that the Constitution contained the important qualification restricting even the legislative discretion, 'in that clause which forbids the appropriation of money for the support of an army for any longer period than two years.'

"In 'The Journal of the Constitutional Convention,' by Mr. Madison, we find that several plans were proposed to safeguard the State and the country at large from the dangers of a standing army—militarism as it is now called—and that the Fathers finally adopted the two-year limit on the supply bills, as being the best and surest method of safeguarding our liberties against the military power which had become, in England, the nightmare and constant dread of those who believed in popular institutions and civil liberties.

"Mr. Hamilton, in No. 29 of 'The Federalist,' ridicules the idea that the liberties of the country, or the reserved rights of the States, can ever be endangered by the Federal Government through the exercise of the military power.

"First, Mr. Hamilton says that 'the scheme of disciplining the whole nation'—compulsory military service, of course—'must be abandoned as mischievous or impracticable.'

"But he goes on to urge the necessity of 'a select corps of moderate size' to be trained as the militia of

the Union; and he says that this moderate corps of Federal troops, together with the State militia, 'appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.'

"Mr. Hamilton ridicules the idea that the militia could ever be dangerous to our liberties, because 'this militia would be composed of our sons, our brothers, our neighbors, our fellow-citizens.'

"Mr. Hamilton asks: 'What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them, in the same feelings, sentiments, habits, and interests? What reasonable cause of apprehension can be implied from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have *the sole and exclusive appointment of the officers?*' (These italics are Mr. Hamilton's.)

" 'If it were possible seriously to indulge a jealousy of the militia, upon any conceivable establishment under the Federal Government, the circumstance of the officers being *in the appointment of the States* ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them—the State officers—a preponderating influence over the militia.'

"What becomes of all this fine theory, of liberty safeguarded forever by constitutional provisions, when Congress enacts military appropriations, covering a whole generation, welding the State militia with the Federal army, uniting to these powers the Presidential right to establish a system of forced labor in mine, mill, and field, and when the very State officers who were, under the Hamiltonian theory, to act as guardians and saviors of State rights and liberties, are them-

selves conscripted into the military service of the Federal Government?'

"Mr. Madison, in one of the finest papers in 'The Federalist' (the 39th), describes the wonderfully complex character of our great Union, which drew from Lord Chatham, in the British Parliament, that eulogy of which Americans have always been proud, and says in conclusion:

" 'The proposed Constitution therefore, even when tested by the rule laid down by its antagonists, is, in strictness, neither a national nor a Federal Constitution; but a composition of both. In its foundation it is Federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly Federal, and partly national; in the operation of these powers, it is national, not Federal; in the extent of them again, it is Federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly Federal nor wholly national.'

"Mr. Madison earned the noble title of 'The Father of the Constitution.' If he did not understand the Organic Law of the Union, probably no one ever did. But if our Government is what Mr. Madison described it to be, it must be obvious to the most superficial thinker, that the Supreme Court, to whom is confided the rights of the Federal Government upon the one hand, and those of the States and the citizens upon the other, needs to be a tribunal of the maturest wisdom, the purest patriotism, the most fearless and determined purpose to uphold the law.

"Mr. Hamilton, in the next to the last paper of 'The Federalist,' declares that Magna Charta, The Petition of Right, The Declaration of Rights of 1688, and the Bill of Rights, *were compacts between kings and their subjects.*

"Mr. Hamilton says that there can be no comparison between such charters, granted by kings to their subjects, and our Constitution, which is *founded upon the power of the people*, and executed by their immediate representatives and servants. He says:

" 'Here, in strictness, the people surrender nothing, and *as they retain everything, they have no need of particular reservations.*' Mr. Hamilton quotes the beginning of the preamble: 'We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.'

" 'This,' says Mr. Hamilton, 'is a better recognition of popular rights than volumes of aphorisms, which make the principal figure in several of our State bills of rights.'

* * * * * * *

"Can the war power be used by Congress in utter disregard of constitutional provisions, and of the various bills of rights of the States?

"Is there no law but that of the majority in Congress, when that majority sees fit to declare that a state of war exists?

"If Congress can enlarge its own powers, without limit, save that prescribed by a majority vote of that Congress, what becomes of the Constitution, and where was the common sense of ever having adopted such a supreme law for the government of this Union?

"Is it not a mere mockery for the Constitution itself to say that it shall not be changed, except by the concurrent action of three-fourths of the States, *if Congress can change it by a majority vote at any time, when it actually sees*, OR PRETENDS TO SEE, *a state of war?*"

Counsel for appellant concedes that the conscription acts of both the Union and Confederate States passed during the war of secession were sustained by the courts, north and south, in a large number of cases. It is respectfully submitted that the points made in the case at bar are quite different from those which were germane to those decisions; and that those decisions are not direct authority to the case at bar which grows out of the application and interpretation of the Thirteenth Amendment to the Constitution; said amendment not having been adopted until after the close of said war of secession.

Respectfully submitted,

J. GORDON JONES,
Counsel for Appellant.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 769.

MEYER GRAUBARD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 21, 1917.

(26,236)

(26,236)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1917.

Writ of Error.

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and Meyer Graubard, defendant, a manifest error hath happened, to the great damage of said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

Allowed by
Louis D. Brandeis,
Associate Justice of the Supreme Court
of the United States.

Indictment.

DISTRICT COURT OF THE UNITED STATES OF AMERICA.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City and County of New York, within and for the District aforesaid, on the first Tuesday of July, in the year of our Lord one thousand nine hundred and seventeen, and continued by adjournment to and including the 13th day of July in the year of our Lord one thousand nine hundred and seventeen.

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the District aforesaid, on their oath

present that on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen, the President of the United States of America duly issued his proclamation as provided by the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," in which said proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several States and in the District of Columbia, in accordance with the said Act of Congress approved May 18, 1917, that the time and place of such registration shall be between 7 A. M., and 9 P. M., on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day therein named are required to register, excepting only officers and enlisted men of the regular army, the navy, the marine corps, and the national guard and naval militia, while in the service of the United States, and officers in the officers' reserve corps, and enlisted men in the enlisted reserve corps, while in active service;

AND THE GRAND JURORS AFORESAID, on their oath aforesaid, do further present that Meyer Graubard, late of the City and County of New York, in the District aforesaid, heretofore, to wit, on the fifth day of June in the year of our Lord one thousand nine hundred and seventeen, at the Southern District of New York and within the jurisdiction of this Court, being a male person between the ages of twenty-one

and thirty, both inclusive, and being subject to registration in accordance with the regulations prescribed by the President, and upon proclamation by the President and other public notice given by him and by his direction, stating the time and place for such registration, being under the duty as a person of the designated ages other than an officer and enlisted man of the regular army, the navy, and the national guard and naval militia, while in the service of the United States to present himself for and to submit to registration, under the provisions of the Act of Congress approved May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," unlawfully and wilfully did fail and refuse to present himself for registration and to submit thereto, as provided by the said Act of Congress, approved May 18, 1917, and in accordance with the regulations prescribed by the President in his proclamation duly issued on the eighteenth day of May in the year of our Lord one thousand nine hundred and seventeen; against the peace of the United States and their diginity, and contrary to the form of the statute of the United States in such case made and provided (Sec. 5 of the Act of May 18, 1917).

FRANCIS G. GAFFEY,
U. S. Attorney.

(Endorsed.)

U. S. District Court. The United States of America vs. Meyer Graubard. Indictment: Wilfully failing to register, and to submit thereto. Sec. 5, Act of May 18, 1917. Francis G. Caffey, U. S. Attorney. A true bill: Charles A. Heaton, Foreman. U. S. District Court, S. D. of N. Y., filed July 13, 1917.

1917

July 16 L. Hand, J.: The defendant arraigned and indct. read. Deft. pleads not guilty, with leave to withdraw bail fixed at $1,000.

July 30 Trial begun, Manton, D. J. Jury sworn.
Verdict, guilty as charged.
Sentenced to one year, Mercer County Jail, Trenton, N. J.
Stay of execution of sentence granted until Aug. 1, 1917.

Stipulation Settling Bill of Exceptions.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff and
Defendant-in-Error.

against

MEYER GRAUBARD,
Defendant and
Plaintiff-in-Error.

It is hereby stipulated and agreed that the annexed is a true bill of exceptions of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, October 1, 1917.

I. M. SACKIN,
Attorney for Defendant and
Plaintiff-in-Error.

FRANCIS G. CAFFEY,
Attorney for Plaintiff and
Defendant-in-Error.

Order Settling Bill of Exceptions.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building in the Borough of Manhattan, City of New York, on the 1st day of October, 1917.

Present: Hon. Martin T. Manton, Judge United States District Court.

UNITED STATES OF AMERICA,
Plaintiff and Defendant-in-Error,

against

MEYER GRAUBARD,
Defendant and Plaintiff-in-Error.

This action having been tried before a stated term of this Court, and a jury having rendered a verdict in favor of the plaintiff and against the defendant, and this bill of exceptions having duly prepared containing all the evidence, it is now,

Duly settled, signed and made a part of the record in this case and ordered on file herein this 1st day of October, 1917.

MARTIN T. MANTON,
United States District Judge.

Notice of settlement waived Oct. 1, 1917.

FRANCIS G. CAFFEY,
United States Attorney.

Bill of Exceptions.

IN THE

UNITED STATES DISTRICT COURT,

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

MEYER GRAUBARD,
Defendant.

This cause came on for hearing before the Hon. Martin T. Manton, District Judge, holding Court, and a jury, on the 30th day of July, 1917. Present, Francis G. Caffey, United States Attorney, and Harold A. Content, Assistant United States Attorney, for the plaintiff; Jacob Panken, attorney for the defendant.

A jury having been duly empaneled and sworn.

Jacob Panken to the Court:

If your Honor please, I move to dismiss the indictment against this defendant on the ground that the indictment is based upon the Act of May 18, as passed by Congress, and Congress was without power to pass such an Act, and it is unconstitutional, it is against the Constitution of the United States. I respectfully call your Honor's attention especially to Article 3, Section 1 of the Constitution, which provides as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior

courts as the Congress may from time to time ordain and establish."

Under this act, the power to create courts is delegated by Congress to the President of the United States, in that, that the act provides that the President of the United States shall create local tribunals, such as appellate tribunals, on the question of exemption.

That is one point I want to raise at this time.

Now, I would ask your Honor again to direct your attention—

The Court: Let me get this clear. What is your point?

Mr. Panken: My point is, it is unconstitutional because of the fact that it delegates to the President of the United States the creation of courts, while the Constitution in Section 1 of Article 3, vests the power to create courts in Congress.

The Court: What follows from that?

Mr. Panken: That the law as drafted is unconstitutional.

The Court: For what reason?

Mr. Panken: Because it delegates the power that has been vested in it to someone else. It is a violation of the Constitution; it cannot delegate the power which has been vested in it, the Congress, as a constitutional body, and it is limited by the provisions of the Constitution.

The Court: What is the next point?

Mr. Panken: I ask your Honor in that connection to direct your attention to the 5th amendment, which reads: "No person shall be deprived of right, liberty or property without due process of law."

We contend that, in this case, in view of the 13th amendment of the Constitution of the United States, which reads as follows:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

In this case, the men are deprived of their liberty without due process of law.

The Court: I do not follow the first point. What has the Court to do with that. What is your argument from that?

Mr. Panken: I did not hear you.

The Court: You say it is unconstitutional for the President of the United States to create courts?

Mr. Panken: Yes, sir.

The Court: What is the court?

Mr. Panken: The exemption boards, and the appellate boards; the creation of those tribunals are delegated by power to be established by the President of the United States.

In that connection, I want to say this; these tribunals will have the power to take away the liberty from men without due process.

The Court: You mean these boards who will pass on excuses?

Mr. Panken: All excuses.

There is another point I would like to call to your Honor's attention; and that is, that the law is discriminatory. It exempts—it is contrary to the First Amendment of the United States Constitution; it is discriminatory in that sense, in that the law provides that certain people holding certain beliefs, shall be exempt, naming practically one church by inference; it only applies to one church, that of the Quakers, objectors who are conscientious objectors, and applying to a certain organization now in existence, they shall be exempt from service.

The Court: As I understand it, the man who asks to be exempted, should have a conscientious belief before Congress passed the Act.

Mr. Panken: If your Honor please, a man may have a conscientious objection and not belong to that particular church.

The Court: It does not say a particular church, it says, if he has a conscientious belief.

Mr. Panken: It says, "a well recognized sect." It says a religious organization, a man must belong to a religious organization. He may have the belief it is wrong to take life, and because of that he is a conscientious objector. He may disbelieve in war, and where a conscientious man objects to going to war, and does not belong to any religious party or organization, that is a discrimination; it is a discrimination against such persons, and it is a discrimination in favor of such religious organization.

The Court: What is the next point?

Mr. Panken: I will rest on that.

The Court: I will deny your motions. I hold that the law is constitutional.

Mr. Panken: May I have an exception? The defendant admits all the facts in the case.

The Court: I do not think I can take your admission.

Mr. Content: I think I had better prove the Government's case.

Mr. Panken: We do not raise the question. We did not raise the issue. We admit we did not register.

The Court: I understand your position.

Mr. Content opened the case to the jury on behalf of the Government.

PAUL HOFHERR testified as follows:

Direct-examination by Mr. Content:

I am an employee of the United States Department of Labor and am the official interpreter at the Immigrant Station at Ellis Island. I have been in the Government service since February, 1904. I know the defendant, Meyer Graubard, for eight years and a half. On the 6th day of June, on the day after registration, at 113 Forsyth Street, I saw and had a conversation with Graubard. I was in the coffee and tea house which is owned by his father and it is there where I saw him. I know him to be over twenty-one years of age, and at that time I was a special agent of the United States Department of Justice, and as such part of my duties were to find out if I could, all those who were not registered within the age to register. I asked the defendant whether he did register. He said no. I asked why and he said it is unconstitutional. I then said he is born in the state and in the United States, of the age to register. He told me he did not register. Four or five days after that I saw him again and had another conversation with him. He said I have not registered. Any time the Government wants to have me arrested I am ready to surrender. I believe I asked him whether he would not register and he said he would not. I reported the facts to the Department of Justice.

CROSS-EXAMINATION by Mr. Panken:

I have known Mr. Graubard about eight to ten years. I have known his father for a number of years. He is about twenty-two or three years old. I have known him since he was a boy of about twelve

years old. I saw him quite often. I know some of his friends and his parents. I know his people very well. I saw him about two or three times a week. I came to have coffee at his father's place. I spoke to other people about him.

By the Court:

His general reputation among the people who know him as to truthfulness and veracity is very good.

EDWARD L. NEWMAN, being duly sworn, and examined as a witness, testified:

By Mr. Content:

I am a special agent for the Department of Justice. Prior to that I was also attached to the United States Immigrant Station situated in New York Harbor. I have been a Government employee since December 1, 1903. On the 13th day of July, 1917, I arrested the defendant, Meyer Graubard, and prior to placing him under arrest I had the following conversation with him in front of 113 Forsyth Street, New York City, where he resides. I asked him whether he registered. He said no. I asked him would he care to register. He said no. I asked him how old he was. He said twenty-two going on twenty-three. I asked him where he was born and he said he was born in the United States. I further admonished him on the fact that if he refused to register he would be subject to some penalty convicted in open court. He said, well, he was willing to take any punishment which was meted out to him. I also spoke to him that subsequent to serving any sentence or paying any penalty that the

Court might decide, he was subject to register as the law provides. He said he did not care anything about it. I said then you may be put into the army anyhow. He said you have to put a bullet into me before you would put a United States Army uniform on me. I placed him under arrest and brought him to the United States Attorney's office and arraigned him before United States Commissioner Hitchcock on the same day.

CROSS-EXAMINATION by Mr. Panken:

He did say something to me about raising the question of the constitutionality of that law. If I remember right, he objected to the draft law on the ground that it was unconstitutional, in his explanation to me.

It is conceded that on the 18th day of May, 1917, in accordance with the provisions of Section 5 of the Act of Congress approved may 18, 1917, the President of the United States issued his proclamation, fixing June 5, 1917, between the hours of 7 A. M., and 9 A. M., as the date for registration, mentioned in Section 5 of the aforesaid Act, and that he called upon all male persons who had attained their twenty-first birthday on that day, and not yet attained their thirty-first birthday on the date, to present themselves for and submit to registration as provided by law.

Mr. Content: The Government rests.

Mr. Panken: The defendant rests. I renew the motions.

The Court: The motions are denied.

Mr. Panken: I take an exception.

Mr. Panken summed up to the jury on behalf of the defendant.

Mr. Content summed up to the jury on behalf of the Government.

Judge's Charge.

MANTON, J.:

Gentlemen of the Jury—This defendant is charged with a violation of what is commonly known as the Selective Draft Law of the United States; and he is charged with this crime by an indictment of the Grand Jury for this, the Southern District of New York.

The Section of the law which we have particularly to do in this trial is this:

"Section 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation other by the President, or rather public notice given by him or by his direction, stating the time and place of such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men in the regular army, the navy, and the national guard and naval militia, while in the service of the United States, to present themselves for, and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid, given by the President, or by his direction; and any person who shall wilfully fail or refuse to present himself for registration, or to

submit thereto as therein provided, shall be guilty of a misdemeanor and shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered; provided, that in the call of the docket, precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act."

That simply has to do with the disposition of the case if it reaches the criminal courts. The preceding provision which I have read to you, you have to do with in this litigation.

Now, the Grand Jury of this District has charged this defendant by its indictment, of this crime, the substance of which I shall read; that within and for this District, the Grand Jury say, that the President of the United States of America duly issued his proclamation as provided by the Act of Congress, approved May 18, 1917, which I have just read to you, entitled, "An Act to authorize the President to increase temporarily the Military Establishment of the United States," in which said proclamation the President of the United States duly proclaimed and gave notice to all persons subject to registration in the several states and in the District of Columbia, in accordance with the said Act of Congress, approved May 18, 1917, that the time and place of such registration shall be between 7 A. M., and 9 P. M., on the 5th day of June, in the year of our Lord, one thousand nine hundred and seventeen, at the registration place in the precinct wherein they may have their permanent homes; that those who shall have attained their twenty-first birthday, and who shall not have attained their thirty-first birthday, on or before the day therein named, are required to register, excepting only officers and enlisted

men of the regular army, the navy, the marine corps, and the national guard and naval militia, while in the service of the United States, and officers in the Officers' Reserve Corps, and enlisted men in the Enlisted Reserve Corps, while in active service.

The Grand Jury then charge Meyer Graubard of New York County, within this said District of New York, with this: That on the 5th day of June, 1917, within this district, and within the jurisdiction of this court, he being a male person, and being between the ages of twenty-one years on his last birthday, and thirty-one years, and being subject to registration in accordance with the regulations prescribed by the President, those which I have just called your attention to, and upon proclamation by the President and other public notice given by him and by his direction, stating the time and place for such registration, being under the duty as a person of the designated ages other than an officer or enlisted man in the regular army, the navy, and the national guard or naval militia, while in the service of the United States, to present himself for, and to submit to registration, under the provisions of the Act of Congress, approved May 18, 1917, entitled "An Act to Authorize the President to increase temporarily the military establishment of the United States," he unlawfully and wilfully failed and refused to present himself for registration and to submit thereto, as provided by the said Act of Congress, approved May 18, 1917, and in accordance with the regulations prescribed by the President in his proclamation duly issued on the 18th day of May in the year of our Lord one thousand nine hundred and seventeen, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

Now, by stipulation of counsel, it is conceded that such proclamation as authorized by law, was issued by the President of the United States; that a date was fixed for registration under this law, which I have called your attention to, and this man lived within the district, the Southern District of New York, and that this defendant failed to register as required by that law.

His counsel has raised the question of the constitutionality of this so-called Selective Draft Law on his preliminary motions. I have ruled that the law is constitutional, and with that you have nothing to do. That is a question of law with which the Court has to do.

Now, that law being constitutional, it is a law which must be obeyed by this defendant.

I charge you, if you find from the evidence, he has violated this law by failing to register, then he may be found guilty of the violation of the law by you.

The evidence adduced here in this case shows to you that he was between the ages of twenty-one and thirty-one years of age, that he was a resident of this district and had his permanent home within this district on the day of registration, to wit: June 5, 1917, and that he intentionally and wilfully failed to register as is required by this Selective Draft Law.

Now, if you find that to be the evidence, and you find that his guilt is established beyond a reasonable doubt, that is, his guilt in violating or breaching this law, it is your duty to convict him for violating the law.

Now, no matter what you may think of this law, no matter what your views may be about it, you cannot let it enter into your deliberations at this time. It

is the law of the land; it is the law of this community; it is a law which must be obeyed by everybody who lives in this community and in this land. The law may not meet with your purposes, may not meet with your views, but nevertheless it is the law here, and it must be obeyed. If a person breaches or violates that law, he is guilty of a violation of the law, and must be punished according as the statute indicates.

The facts must be established to your satisfaction beyond a reasonable doubt; that is to say, his guilt must be established to your satisfaction beyond a reasonable doubt.

You have nothing to do with the question of law. I have charged you as to that. If I make a mistake as to the law, it may be corrected by another tribunal, but it is final for you in your deliberations.

Now, you may ask what is a reasonable doubt. Well, a reasonable doubt is a doubt for which you can ascribe a reason; and if you have a reasonable doubt as to the guilt of the defendant on the facts here, after considering the evidence and applying the law, you must give the defendant the benefit of that doubt. He starts out with the presumption of innocence, and that presumption is with him throughout the trial. He is presumed to be innocent, and it is incumbent on the prosecution in this case, the government, to establish beyond a reasonable doubt, his guilt, to remove that presumption.

If you are satisfied from the evidence he is guilty beyond a reasonable doubt, then you will find him guilty, otherwise you will acquit him.

Mr. Content: In my desire for speed, I forgot to prove that the defendant admitted to me that he was not a member of the regular army, the navy, or

the national guard or naval militia in the active service of the United States.

The Court: Is there any objection to stipulating that at this time?

Mr. Panken: No objection to stipulating that at this time.

The jury retired to deliberate upon their verdict.

Verdict.

The Clerk: Gentlemen, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We find the defendant guilty as charged.

The Clerk: Harken to your verdict as it stands recorded in the case of the United States vs. Meyer Graubard, you find the defendant guilty as charged, and so say you all.

Mr. Panken: I ask that your Honor set aside the verdict of the jury on the ground that it is against the law.

The Court: Motion denied.

Mr. Panken: I take an exception.

Assignments of Error.

IN THE SUPREME COURT OF THE UNITED STATES.

MEYER GRAUBARD,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

Now comes the above-named Meyer Graubard, plaintiff-in-error, by his attorney, and makes and files the following assignments of error upon which he will rely upon the prosecution of the writ of error to the Supreme Court of the United States sued by him herein to review the errors committed in the above-entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against him in the said court.

That the District Court erred as follows:

FIRST: In denying the defendant's motion made at the opening of the trial to dismiss the indictment upon the ground that the same did not charge the defendant with any offence against the United States or any law thereof upon the following grounds:

1. That there can be no violation of law in failing to comply with the provisions of the Act entitled:

"An Act to authorize the President to increase temporarily the military establishment of the United States."

approved May 18, 1917, also known as the "Selective Draft Law" in that the said act is unconstitutional upon the following grounds:

A. It violates Section 1 of Article 3 of the Constitution of the United States, which reads as follows:

"The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

Under this Act the power to create courts is delegated by Congress to the President of the United States, in that the Act provides that the President of the United States shall create local tribunals and appeal tribunals that are to pass judicially on all questions of exemption.

B. It violates Section 13, Subdivision 1, of the Amendments to the United States Constitution, which reads as follows:

"Neither slavery nor involuntary servitude except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

C. It violates Article V of the amendment to the Constitution, which reads as follows:

"No person shall be deprived of life, liberty or property without due process of law."

D. It violates Article 1 of the amendments to the Constitution, which reads as follows:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

SECOND: The Court erred in denying the motion made by the defendant at the close of the Government's case to direct an acquittal.

THIRD: In denying the defendant's motion to set aside the verdict of the jury rendered against him on the ground that it was contrary to the law.

FOURTH: The Court erred in denying the motion made by the defendant for an arrest of judgment on the ground that the facts stated in the indictment did not constitute a crime.

Wherefore, the defendant prays that judgment herein be reversed.

Dated, August 31, 1917.

I. M. SACKIN,
Attorney for Defendant,
Meyer Graubard,
Office & P. O. Address,
5 Beekman Street,
Borough of Manhattan,
City of New York.

Petition for Writ of Error.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,
against
MEYER GRAUBARD,
Defendant.

Now comes the above-named defendant, Meyer Graubard, by his attorney, and complains that on the 20th day of July, 1917, the District Court of the United States for the Southern District of New York, gave judgment in the above-entitled cause against the defendant in which judgment in this cause, certain errors were committed to the prejudice of this defendant.

FIRST: In respect to the Court's con-truction and application of the Constitution of the United States and its disposition of the merits of the cause, all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore, the said defendant, Meyer Graubard, prays for the allowance of a writ of error and for such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected, the

said Justices of the Supreme Court of the United States cause further to be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

And your petitioner will ever pray, etc.

Dated, this 31st day of August, 1917.

I. M. SACKIN,
Attorney for Defendant,
Meyer Graubard,
Office & P. O. Address,
5 Beekman Street,
Borough of Manhattan,
City of New York.

Supersedeas.

Writ of error, to operate as a supersedeas, allowed, returnable, according to law, the defendant to furnish bail in the sum of Six thousand ($6,000) dollars, conditioned according to law, subject to the approval of one of the Judges of the United States District Court for the Southern District of New York.

Dated, August 31st, 1917.

LOUIS D. BRANDEIS,
Associate Justice of the United States Supreme Court for the Second Circuit.

Citation.

United States of America, ss:

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office by the District Court of the United States for the Southern District of New York, wherein Meyer Graubard is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this thirty-first day of August, in the year of our Lord one thousand nine hundred and seventeen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court
of the United States.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEYER GRAUBARD,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Southern District of New York:

Writ of error and order allowing same, dated August 31, 1917.

Indictment, filed July 13, 1917.

Bill of exceptions, dated October 1, 1917.

Assignments of error, dated August 31, 1917.

Petition for writ of error, and supersedeas endorsed thereon, dated August 31, 1917.

Citation, dated August 31, 1917.

Stipulation settling record.

Clerk's certificate, dated October , 1917.

Dated, New York, October 20, 1917.

I. M. SACKIN,
Attorney for Plaintiff-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-in-Error.

Consent.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MEYER GRACBARD,
Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, October 31, 1917.

J. M. SACKIN,
Attorney for Plaintiff-in-Error.

FRANCIS G. CAFFEY,
Attorney for Defendant-in-Error.

Clerk's Certificate.

United States of America, Southern District of New York, } ss:

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

vs.

MEYER GRAUBARD,
Defendant-in-Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 5th day of [illegible] in the year of our Lord one thousand nine hundred and [illegible] and of the Independence of the said United States the one hundred and thirty.

ALEX. GILCHRIST, JR.,
Clerk.

FILE COPY

FILED
DEC 10 1917
JAMES D. MAHER

No. 769.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

MEYER GRAUBARD, *Appellant*,

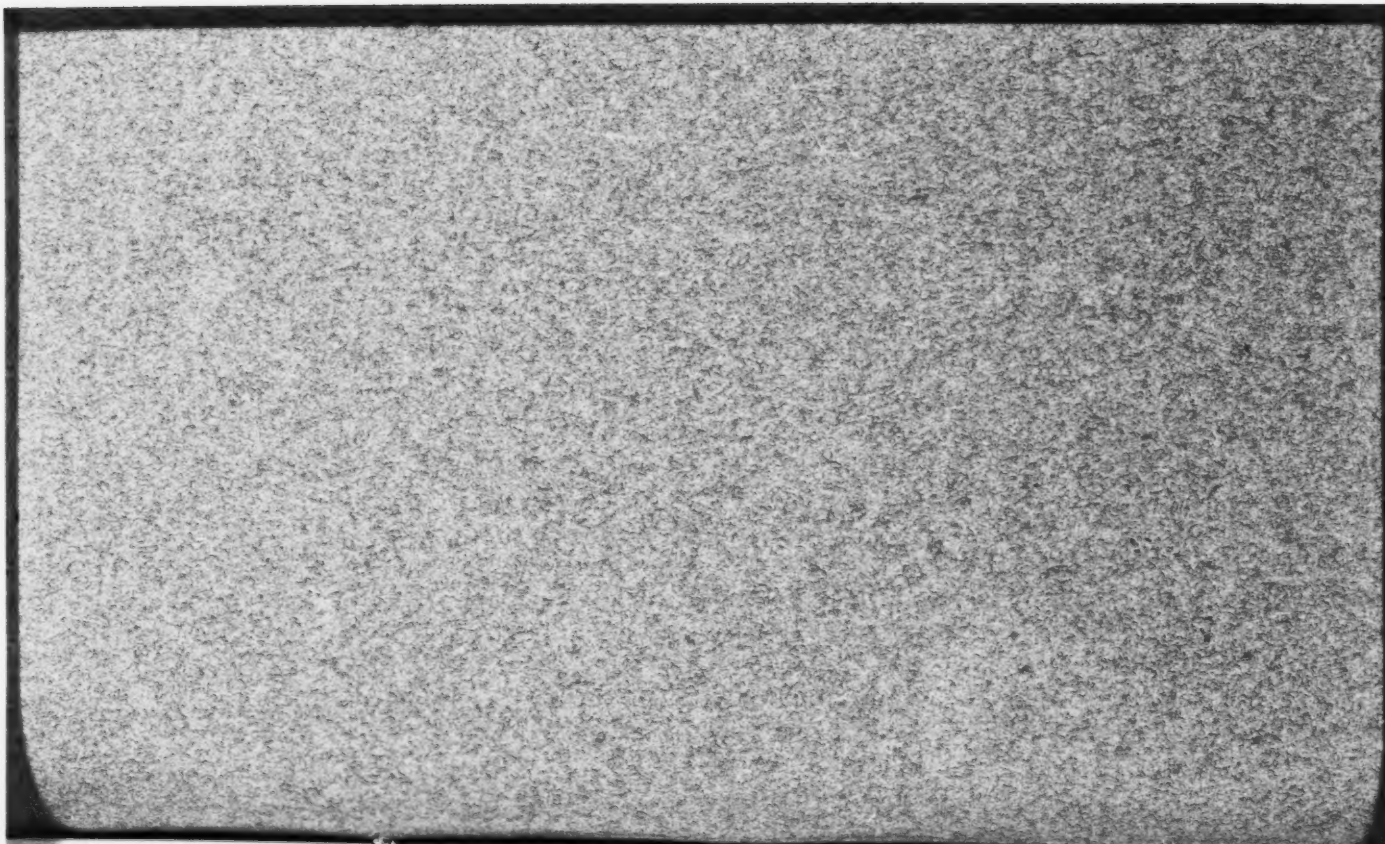
v.

THE UNITED STATES OF AMERICA, *Respondent*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE APPELLANT TO ADVANCE.

Press of the Sudwarth Company.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1917.

MEYER GRAUBARD, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Respondent*. } No. 769.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY APPELLANT TO ADVANCE.

Comes now Edwin D. Talliaferro, Esq., Counsel for the Appellant and appearing on his behalf and respectfully moves the court to advance the above entitled cause and set it down for hearing with No. 656, No. 663, No. 664, No. 665, No. 666, No. 680, No. 681, and No. 702 heretofore advanced and set for hearing on Monday, December 10, 1917.

This is another of the cases known as the "Selective Draft Law" cases.

Appellant was convicted in the United States District Court for the Southern District of New York for failing to appear and register himself, in violation of the act of Congress approved May 18, 1917, and the proclamation of the President.

He was sentenced to imprisonment for one year and a fine was imposed upon him as appears from the record on appeal.

He obtained a writ of error from one of the justices of this court and is now on bail.

The sole question involved in this appeal is the constitutionality of the act of Congress approved May 18, 1917. Cases No. 663, No. 664, No. 665, No. 666 and No. 680 advanced as before stated, involve the identical same question involved in this appeal, and none other. Petitioner therefore submits that it would economize the time of this court and simplify matters in the argument if this case were argued at the same time of the cases above mentioned. He therefore respectfully prays that an order be entered herein advancing this case and setting it down for argument with the other cases heretofore mentioned. Petitioner is counsel for Appellant and is here from New York City for the purpose of arguing this appeal.

Notice of this motion has been served upon the Solicitor General and he has consented that an order be entered as herein prayed. Appellant has no attorney of record who is admitted to practice in this court, but has appeared in person.

EDWIN D. TALLIAFERRO,
of Counsel for Appellant.

December 7, 1917.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

MEYER GRAUBARD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. ——.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause and set it down for hearing with Nos. 656, 663, 664, 665, 666, 680, 681, 702, and 738, heretofore advanced and set for hearing on Monday, December 10, 1917.

This is another of the cases known as the "Selective Draft Law" cases.

Plaintiff in error was convicted in the District Court of the United States for the Southern District of New York for failing to appear and register himself as required by the so-called "Selective Draft Law" of May 18, 1917, and the proclamation of the President issued pursuant thereto. He was sentenced to imprisonment for the period of one year in the

Mercer County Jail, New Jersey, and is now serving his sentence because of the refusal of the trial court to admit him to bail.

The principal question presented in the case is the constitutionality of the "Selective Draft Law."

Prompt enforcement of the criminal provisions of the law involved and the administration of the provisions governing the drafting and assembling of the Army are reasons for requesting the determination of this case at the same time as the others hereinbefore mentioned.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1917.

○

FILE COPY

Office Supreme Court, U. S.
Dec 10 FILED
[redacted] 1917
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 769.

MEYER GRAUBARD,
Plaintiff-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

Brief for Plaintiff-in-Error.

( )

Supreme Court of the United States

MEYER GRAUBARD,
Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

The Case.

This is an appeal from a verdict of conviction, and judgment thereon, rendered in the United States District Court for the Southern District of New York, on the 30th day of July, 1917.

The plaintiff-in-error was indicted in that court for a violation of the Act of Congress approved May 18th, 1917, entitled, "An Act to authorize the President to increase temporarily the military establishment of the United States." He pleaded not guilty to the indictment, and upon the trial before a jury was convicted, and this is an appeal to this Court from the judgment of conviction.

After such conviction the plaintiff-in-error presented to one of the Justices of this Court a petition for a writ of error, which, on the 31st day of August, 1917, was granted and a citation duly issued.

. The questions submitted to this Court upon the appeal, therefore, are contained in the assignment of errors set forth in the record, and in substance present the constitutionality of the said Act of Congress.

POINT I.

No power is expressly granted by the Constitution of the United States, to Congress, to pass a Selective Draft Act or other conscription or forcible service Act. Such an Act is in violation of the Constitution of the United States and of the sovereign right of the citizen.

A conscription, or forcible military service act, is fundamentally wrong and without Constitutional authority. Such was not contemplated by the Constitution of the United States when adopted in 1789, and no amendment to the Constitution since that time grants such a power to Congress.

At the time of the adoption of the Constitution, there was not then in force in any country in Europe, nor in any civilized country in the world, nor in the United States, any law with one exception, authorizing conscription or forcible service in the army.

In an opinion delivered by Mr. Justice Rogers in the District Court of the United States for the Southern District of New York in the case of *John Anglus vs. John Sullivan and others*, reported in N. Y. Law Journal of Oct. 25, 1917, he makes the following statement, viz:

> "At the time the Constitution was adopted, conscription was not an unknown mode of raising armies, but had been resorted to by governments throughout the world."

It is true that at that time an act had been passed in May, 1777, by the General Assembly of Virginia, providing for forcible conscription, and that said act was drafted by Thomas Jefferson.

But this was a state conscription law and not a national one.

So that, as we are informed, no government in Europe at the time of the adoption of the Constitution of the United States exercised or had the right to exercise, with one exception, the power of forcible conscription.

At that time such a power was not expressed in the general power of any government to raise an army, or to do other acts for the general welfare of the country, with the one exception mentioned.

In 1704, and again in 1707, conscription bills were introduced in the Parliament of England, and after full discussion and consideration, were laid aside as unconstitutional. See Opinion of Mr. Justice Woodward in the case of *Kneedler et al. vs. Lane et al.*, 45th Pa., 255.

At that time, of course, as it is today, England had no written Constitution, as we have in this country, defining definitely the powers of the law-making branch of the government. It was, perhaps, largely due to this historical fact that Mr. Justice Woodward reached his conclusion in the above case, and in which he uses the following language:

> "I raise my objections to its constitutionality upon these grounds:
>
> "1st. That the power of Congress to raise and support armies does not include the power to draft the Militia of the states.

"2nd. That the power of Congress to call forth the Militia cannot be exercised in the form of this enactment.

"3rd. That a citizen cannot be subjected to the rules and articles of war until he is in actual military service.

"4th. That he is not placed in such actual service when his name has been drawn from a wheel and notice thereof has been served upon him."

Kneedler et al. vs. Lane et al., 45th Pa., 255.

In 1702 the Royalist Military forces of France, being greatly depleted and at a very low ebb, it was proposed to pass a law authorizing forcible conscription. However, the Constituent Assembly, being the law-making power of France at that time, rejected the proposition upon the sole ground that "compulsory service was at variance with the liberty of the citizens."

Enc. Britannica, Vol. 2, page 505.

In 1798, however, under the iron heel of Napoleon, the law-making power of France adopted a Conscription Act and other sovereignties and governments of Europe almost immediately followed the example.

This, however, was long after the adoption of the Constitution of the United States.

It will be observed also that it was not claimed that the State or Colony of Virginia had the inherent power to conscript. It required an Act of Assembly to do so. Besides that, the act only proposed to conscript for militia purposes.

About the year 1670, Ernest Augustus, Duke of Hanover, the father of King George the First of England, made it a business to sell or rent his soldiers to other sovereigns to fight their battles in foreign countries. It is related by Mr. Thackeray in his lec-

tures on the Four Georges, that at one time Ernest Augusus "sold" to the Doge of Venice, 5,400 soldiers to fight his battles, and that of this number only 1,400 ever returned home. This wholesale sale of soldiers was excused upon the ground that the revenue derived therefrom was necessary for the support of the Duke's kingdom, and therefore could properly come under the general welfare powers of the sovereign power. Other sovereigns in Europe and in Prussia did the same thing, notably the Duke of Saxony and the Duke of Zelle. *This was forcible military service.*

Of course, in the above cases, soldiers were not fighting in the defense of their own country, nor to resist invasion, whereas, enlistments under our Conscription Act are for purposes deemed necessary to the maintenance and dignity of our Government.

Nevertheless, it is fair to assume that the Hanoverians fought against their will and fought in a foreign country; and if the plaintiff-in-error's conviction should stand and he is forced to the front in a foreign country, he would be fighting against his will and in a foreign country.

The action of Duke Ernest Augustus and other sovereigns of Prussia in selling their troops and sacrificing so many lives of soldiers, resulted in such a tragic disaster and wholesale slaughter of human beings, that the whole of Europe revolted against such forcible military service.

In this enlightened 20th century, our own people are in full accord with the principle that "an avoidable war is a public crime."

It was, perhaps, largely due to this fact that the English Parliament in 1704, and again in 1707, refused to pass a forcible conscription bill, because the same was unconstitutional. Perhaps, also, another result was the refusal of the Constituent Assembly of France, in 1792, to pass such a bill. So that, instead

of conscription laws and a conscription system being in force in any civilized country in Europe at the time of the adoption of the Constitution, the opposite with one exception, seems to be true. If, on the contrary, the policy of other civilized governments of the world was to raise armies entirely and solely by volunteer service; and if other civilized governments had expressly refused to pass conscription acts because they were unconstitutional or violative of the rights of the citizen, then we submit that a fair construction of the meaning of the words "to raise an army" would only include the right to raise an army by voluntary service.

It is a significant fact that the Constitution originally consisting of Seven Articles and subsequently of Seventeen Amendments, nowhere confers upon Congress the power to pass, or the President to enforce, a forcible draft or conscription act. It can well be understood that the monarchs of Europe have exercised and claimed powers over their armies, and over their subjects, which were never claimed by the Government of the United States, and which powers were expressly repudiated by the Constitution.

In free America every citizen is a sovereign and no soldier is a serf.

One of the best considered cases on the right of conscription that has come before any of the courts in this country is the case of *Kneedler et al. vs. Lane et al., supra.* In that case the Court by a majority of one held a conscription act to be unconstitutional. Afterwards one of the Judges then presiding retired and another was elected to fill his place. His successor held different views from the retiring Judge, and the decision of the Court was therefore changed and reversed. This decision was rendered in 1863, and must have challenged the attention of the entire coun-

try, especially of members of Congress and of the United States Senate.

Other amendments have been adopted since that time, and still with the full knowledge of the importance of the subject, no amendment has been proposed authorizing Congress to pass a conscription act. More than this, the highest Court of Appeals of a number of states, during the War of the Rebellion, passed upon the constitutionality of conscription acts, and nearly all, or quite all of them held such acts to be unconstitutional. Thus emphasizing the importance of an amendment.

It will be noted, however, upon an examination of these decisions, that most of them were decided upon the proposition that a conscription act was constitutional as applied to the militia raising power of the state, and some of these decisions are entirely silent upon the authority of Congress to do so. Of course, we are not to forget the fact that these decisions were rendered in the excitement of a fierce and bitter Civil War.

The following reported cases on the constitutionality of the conscription acts will be found in the books:

Spangler, 11th Mich., 298.
Druecker vs. Solomon, 21st Wis., 621.
Allen vs. Colby, 47th N. H., 544.
Ex parte Copeland, 26th Texas, 386.
Jefferson vs. Fair, 33rd Ga., 347.
Barber vs. Irwin, 34th Ga., 28.
Ex parte Hill, 38th Ala., 429.
Ex parte Bolling, 30th Ala., 609.
Gatlin vs. Walton, 60th N. C., 333.
Burr vs. Paton, 57th Va., 470.
Knedler vs. Lane, 45th Pa., 238.

It is safe to assert, in view of the pronounced opposition in Congress and public sentiment among the people against a conscription bill, that if an amend-

ment to the Constitution had ever been proposed, authorizing conscription, the same would never have received the necessary approval.

There was one exception to the general policy of European sovereignties and governments in failing or refusing to adopt a conscript law.

During the American Revolution the Statute of 19th Geo. 3, Ch. 10, permitted the impressment of "idle and disorderly persons not following any lawful trade or having some substance sufficient for their subsistence," and this was as far as English legislation had gone when our Federal Constitution was adopted in 1789. Upon this act Mr. Justice Woodward in the case reported in 45th Pa., 255, makes the following pungent comment:

> "Assuredly the framers of our Constitution did not intend to subject the people of the States to a system of conscription which was applied in the mother country only to paupers and vagabonds."

POINT II.

The Act of May 18th, 1917, is unconstitutional, because it authorizes the President of the United States to "raise an army" while this power is alone conferred on Congress.

Neither the contention for implied powers in the Constitution, nor the extension of the power of Congress under the General Welfare Clause to pass laws, can in any way affect the provisions, our contention providing that the President had no power under the Constitution to "raise an army."

The language of Article I, Section 12, of the Constitution is as follows:

> "12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

In construing this clause of the Constitution we submit that the only question to be determined is *whether the Constitution says what it means and means what it says.* The Constitution expressly gives the power to "raise an army" to Congress and to *Congress alone.* It confers no power expressly or impliedly upon the President of the United States to "raise an army."

Section 13 of Article I of the Constitution reads as follows:

> "13. To provide and maintain a navy."

Suppose the Act of May 18th had expressly authorized the President of the United States "to provide and maintain a navy." Would this Court have held that such an act was constitutional? There can be but one answer.

Then, if under the Constitution the President has no power to provide and maintain a navy, because by Article I of the Constitution that power is given alone to Congress, we submit for the very same reason that Congress had no authority to confer upon him the power to "raise an army."

It may be said that the raising of an army implies physical, executive and ministerial acts, such as Congress cannot perform, and such as may and must be delegated to some executive officer. Whether this be true or not, still the power to "raise an army" is conferred in express terms on Congress and not upon the President.

We see no reason why Congress could not pass laws, rules and regulations specifying of what an army shall

consist—how many companies, regiments, divisions and corps—the particular method of obtaining volunteer service, time of service, locality and period of enlistment and every detail in the way of regulations which the President himself could do. The President of the United States cannot physically and personally go into the different sections of the country and "raise an army" by enlistment or conscription. It must at least be done by other persons to be named by him, and Congress could have done identically the same thing just as the Constitution required.

The plain, common sense construction of the Act of Congress is unambiguous. Congress has simply said by this Act.

> "It is true that the Constitution of the United States has clothed us with the power of 'raising an army.' It is also true that the Constitution has not clothed the President of the United States with the power to 'raise an army.' On the contrary the Constitution has withheld this power from the President and conferred it upon us and upon us alone. Notwithstanding this fact, we will arbitrarily by this Act clothe the President with the power to 'raise an army,' doing exactly what the Constitution has in effect said he could not do, and that we alone could do."

We submit that this proposition cannot be answered. In the case of

McCullough vs. Maryland, 4th Wheaton, 415,

Mr. Justice Marshall of this Court delivered an able and exhaustive opinion upon the implied powers of Congress. He went so far as to hold that Congress had the constitutional power to pass an Act organizing a banking corporation. The case is, perhaps, the leading one in all the books on the subject of the implied powers of Congress.

As before stated, however, the question of "implied powers" does not arise, where express terms are used, and where the necessity of invoking implied powers does not arise. For the same reason, the General Welfare Clause of the Constitution cannot be used as an argument on this proposition, because of the fact of the express language used by the Constitution.

It may be insisted that the power conferred by Congress upon the President was a power to *execute a law* passed by Congress and nothing more. In the opinion of Mr. Justice Rogers in the case of *John Anglus vs. John Sullivan, supra*, he announces this doctrine and cites in support of it the case of *Field vs. Clark*, 143rd U. S., 649.

In this case the majority of the Court held that the Act complained of was not unconstitutional.

Mr. Justice Lamar dissented, and Chief Justice Fuller concurred in the dissent. The decision, however, does recognize the general doctrine that Congress has no power to confer on the President the power to make a law, but has the power to clothe him with authority to execute a law.

We submit that this case and other cases deciding the same question, do not militate against our contention in this case. In other words, we submit that the power conferred is so express and unequivocal in its terms, that it does not admit of the application of the doctrine of "implied powers."

We submit further that it is wholly immaterial whether Congress can clothe the President with legislative power or with the power to execute a law, so far as this case is concerned. This is so because of the unequivocal language of the Constitution confining the power to "raise an army" alone upon Congress.

We submit further that if the Constitution were to clothe Congress with the power to do a physical act or to perform an executive act, Congress would then have the right under such a provision to do either, and no other co-ordinate branch of the Government would have such power.

What difference does it make whether the power conferred is to do an executive act or a legislative act? Even if it be true that Congress could not perform the executive act, it would by no means follow that the President would have the right to perform such executive act, because of the obvious fact that no such power was granted to him by the Constitution.

After all, we go back to the proposition what was meant by the words "raise an army" at the time of the adoption of the Constitution? We cite on this proposition an extract from *Black on Interpretation of Laws* 143. This authority lays down the rule as follows:

> "The rule is that words and phrases implied in a Statute are to be read in their natural and ordinary sense according to good and approved usage, etc., etc."

In support of this proposition he cites a very large number of authorities, both Federal and State. They are as follows:

> 148 Federal Reporter, 771.
> 120th Ill. App., 70.
> 23rd Ind., 137.
> 94th Mo., 330.
> 128th App. Div. (N. Y.), 257.
> 108th Va., 245.
> 196th N. Y., 260.

and numerous other decisions.

So that it comes to the proposition of what was meant by "raising an army" at the time of the adoption of the Constitution. In order to determine what

was the proper construction of that language at that time, we must look to the use of the language by England, France and other civilized countries. Adopting this rule of construction, we submit that there was no civilized government in Europe or upon the face of the earth at that time, that construed the meaning of the words "raise an army" to include the power to conscript. In the case in *15th Pa., 255, supra*, Mr. Justice Woodward very properly uses the following language:

> "On the contrary I infer that the power conferred on Congress was the power to raise armies by the ordinary English method of voluntary enlistment."

So that we wind up this point, as we began, with this statement, that if the Constitution means what it says, and says what it means, the Act of May 18th was in violation of that instrument, because it conferred upon the President the power to "raise an army" when such power was alone given to Congress.

POINT III.

The Act is unconstitutional because it clothes the President with the power of creating courts of justice.

Section 1 of Article III of the Constitution reads as follows:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

In Section 4 of the Act of May 18th, 1917, it is provided that the President "is hereby authorized in

his discretion to create and establish * * * local boards, etc., etc."

It is also provided in Section 4 of said Act that the President is authorized "to establish additional boards, one in each judicial district of the United States, consisting of such number of citizens not connected with the military establishment as the President may determine, who shall be appointed by the President. * * *

"Such district boards shall review on appeal and affirm, modify or reverse any decision of any local board etc., etc."

By the express terms of this Act the President of the United States is authorized to "create" a local board.

He is also authorized to establish additional boards known as "district boards" with the power to "review on appeal and affirm, modify or reverse any decision of the local boards."

We submit that if language means anything the President under this Act becomes the creator and the original organizer of both the district boards and the local boards.

The inquiry then arises. Are these boards Courts in the sense that that term is used in the Constitution? This Court, of course, will take judicial notice of the rules and regulations provided for the organization of these boards and their methods of conducting business. Take for instance the City of New York. On the district board of that city are a number of distinguished and eminent lawyers.

Among them, Hon. Charles E. Hughes, once a member of this Court, and Hon. Edgar E. Cullen, formerly Chief Judge of the Court of Appeals of the State of New York. These judges, as members of the district board, and sitting in the same, act essentially as

POINT IV.

The Act of May 18th, 1917, should be declared unconstitutional, the judgment of the lower courts should be reversed, and the defendant discharged.

SUPREME COURT OF THE UNITED STATES.

No. 656.—October Term, 1917.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, Plaintiffs in Error, *vs.* The United States of America.	In Error to the District Court of the United States for the Northern District of Ohio.

[January 14, 1918.]

Mr. Chief Justice White delivered the opinion of the Court.

Schue was indicted for having failed to register as required by the Act of Congress of May 18, 1917 (Public No. 12, 65th Congress, c. —, — Stat. —) known as the Selective Draft Law, and in the same indictment it was charged that Ruthenberg, Wagenknecht and Baker, the plaintiffs in error "did aid, abet, counsel, command and induce" Schue in failing to register "and procure him to commit the offense involved in his so doing." Schue pleaded guilty and the other three defendants were tried, found guilty and sentenced. Because of objections raised to the constitutionality of the Act this direct writ of error was prosecuted.

As every contention made in this case concerning the unconstitutionality of the Selective Draft Law was urged in *Arver* v. *United States*, *ante*, p. —, and held to be without merit, that subject may be put out of view. The remaining assignments of error are to say the least highly technical and require only the briefest notice.

The want of merit in the proposition that constitutional or statutory rights were denied the plaintiffs in error who were Socialists, because the grand and trial juries were composed exclusively of members of other political parties and of property owners, is demonstrated by previous adverse rulings upon similar contentions urged by negro defendants indicted and tried by juries composed of white men. *Martin* v. *Texas*, 200 U. S. 316, 320, 321; *Thomas* v. *Texas*, 212 U. S. 276, 282.

A further objection that plaintiffs in error were prejudiced by the refusal of the court below to permit them in examining the

jurors to inquire whether they distinguished between socialists and anarchists is likewise disposed of by previous decisions. *Spies* v. *Illinois*, 123 U. S. 131; *Thiede* v. *Utah Territory*, 159 U. S. 510; *Holt* v. *United States*, 218 U. S. 245, 248.

It is contended that plaintiffs in error were not tried by a jury of the state and district in which the crime was committed, in violation of the Sixth Amendment, because the jurors were drawn not from the entire district but only from one division thereof. The proposition disregards the plain text of the Sixth Amendment, the contemporary construction placed upon it by the Judiciary Act of 1789 (c. 20, 1 Stat. 73, 88, sec. 29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. Section 802, Revised Statutes; Section 277, Judicial Code. *Agnew* v. *United States*, 165 U. S. 36, 43; *United States* v. *Wan Lee*, 44 Fed. Rep. 707; *United States* v. *Ayres*, 46 Fed. Rep. 651; *United States* v. *Peuschel*, 116 Fed. Rep. 642, 646; *Clement* v. *United States*, 149 Fed Rep. 305; *Spencer* v. *United States*, 169 Fed. Rep. 562, 565, 566; *United States* v. *Merchants, &c. Co.*, 187 Fed. Rep. 355, 359, 362.

It is argued that the court below erred in refusing to quash the indictment on the ground that it had been found "without a sworn charge previously made." It is settled that such a charge is unnecessary. *Frisbie* v. *United States*, 157 U. S. 160, 163; *Hale* v. *Henkel*, 201 U. S. 43, 59, 60.

Further, it is said, the indictment was insufficient because it did not allege that Schue, who it was charged refused to register, was a citizen of the United States or was a person not an alien enemy who had declared his intention to become such citizen. But this overlooks the fact that although only the persons described were subject to military duty under the terms of the Act, by section 5 "all male persons between the ages of 21 and 30, both inclusive" (with certain exceptions not here material) were required to register. It was sufficient to charge, therefore, as the indictment did, that Schue was a male person between the designated ages.

The contention that more than one offense was charged in the same indictment is without merit. Section 332 of the Criminal Code provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a

principal." The indictment, therefore, charged but one offense—the refusal of Schue to register—plaintiffs in error being charged as principals in procuring such refusal. And this also disposes of a further contention based upon the same misconception that as at common law there could be no accessory to a misdemeanor, no offense was charged in the indictment.

Other errors are assigned but we do not expressly notice them, some because they are not urged in argument, others because they are so unsubstantial as not to require even statement, and we content ourselves with saying that after a careful examination of the whole record we find no error and the judgment is

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 663, 664, 665, 666, 681 and 769.—October Term, 1917.

Joseph F. Arver, Plaintiff in Error, 663 *vs.* The United States of America. Alfred F. Grahl, Plaintiff in Error, 664 *vs.* The United States of America. Otto Wangerin, Plaintiff in Error, 665 *vs.* The United States of America. Walter Wangerin, Plaintiff in Error, 666 *vs.* The United States of America.	In Error to the District Court of the United States for the District of Minnesota.
Louis Kramer, Plaintiff in Error, 681 *vs.* The United States. Meyer Graubard, Plaintiff in Error, 769 *vs.* The United States of America.	In Error to the District Court of the United States for the Southern District of New York.

[January 7, 1918.]

Mr. Chief Justice White delivered the opinion of the Court.

We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. —, —Stat. —.) entitled "An Act to authorize the President to increase temporarily the military establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass

upon and those which will throw light on their significance are briefly summarized.

The Act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 5, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the Act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the Act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The Act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a non-combatant character to be defined by the President.

The proclamation of the President calling the persons designated within the ages described in the statute was made and the plaintiffs in error who were in the class and under the statute were obliged to present themselves for registration and subject themselves to the law failed to do so and were prosecuted under the statute for the penalties for which it provided. They

all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft and if such power had been given by the Constitution to Congress, the terms of the particular Act for various reasons caused it to be beyond the power and repugnant to the Constitution. The cases are here for review because of the constitutional questions thus raised, convictions having resulted from instructions of the courts that the legal defences were without merit and that the statute was constitutional.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, sec. 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, section 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article VI. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised pro-

vided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.* In England it is certain that before the Norman Conquest the duty of the great

*In the argument of the Government it is stated: "The Statesman's Yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Columbia, p. 790; Chili, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1191; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March 1905 (Duvergier, vol. 105, p. 133).

militant body of the citizens was recognized and enforcible. Blackstone, Book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.*

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the Government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States, an illustration being afforded by the following provision of the Pennsylvania constitution of 1776. "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Art. 8. (Thorpe, American Charters, Constitutions and Organic Laws, vol.

*Military Service Act, January 27, 1916, 5 and 6 George V, c. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2nd session, 6 and 7, George V, c. 15, p. 33.

1, pp. 1081, 1085.* While it is true that the States were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the States to resort to draft to fill their quotas—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be framed it was not in dispute that one of the recognized necessities for its adoption was the grant of power to Congress to raise an army and to impose upon the States the duty of furnishing the quotas. In applying the powers it was manifestly intended to give to all and more than to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article I, sec. 10.

We argue that as the sole authority upon the subject given by the Constitution conferred upon Congress the right of Congress to raise an army, limited only as to amount, it necessarily followed that the power to compel the citizen to service in the army of the United States was a power to be found in the right to raise armies, and that to exercise it a different basis be found in the right to raise armies, and that to exercise it a different basis be found in the right to raise armies, and that to exercise it a different basis

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producing a force of about a quarter of a million men.* It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard (Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 5, 1916, c. 134, 39 Stat. 211). And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the National Guard Reserve. (National Defense Act, *supra.*)

Thus sanctioned as is the Act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government since the formation of the Constitution, the want of merit in the contentions that the Act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the Act was maintained for reasons not different from those which

*Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

control our judgment. (*Kneedler* v. *Lane*, 45 Pa. St. 238.) And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted not differing in principle from the one here in question was challenged, its validity was upheld evidently after great consideration by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs* v. *Peyton*, 16 Gratt. 470; *Jeffers* v. *Fair*, 33 Georgia 347; *Daly and Fitzgerald* v. *Harris*, 33 Ga. Supp. 38, 54; *Barber* v. *Irwin*, 34 Georgia 27; *Parker* v. *Kaughman*, 34 Georgia 136; *Ex parte Coupland*, 26 Texas 386; *Ex parte Hill*, 38 Alabama 429; *In re Emerson*, 39 Alabama 437; *In re Pille*, 39 Alabama 459; *Simmons* v. *Miller*, 40 Mississippi 19; *Gatlin* v. *Walton*, 60 N. C. 333, 408.

In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past,* how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating as it does upon all the powers conferred by the Constitution leaves no possible support for the contentions made if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which while not disputing power, challenge the Act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the Act is void as a dele-

*Slaughter House Cases, 16 Wall. 36, 72-74, 94-95, 112-113; United States v. Cruikshank, 92 U. S. 542, 549; Boyd v. Thayer, 143 U. S. 135, 149; McPherson v. Blacker, 146 U. S. 1, 37.

gation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases; *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497; *West* v. *Hitchcock*, 205 U. S. 80; *Ocean Navigation Co.* v. *Stranahan*, 214 U. S. 320, 338-340; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275. And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the Act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 680.—October Term, 1917.

Louis Kramer and Morris Becker, Plaintiffs in Error, *vs.* The United States.	In Error to the District Court of the United States for the Southern District of New York.

[January 14, 1918.]

Mr. Chief Justice White delivered the opinion of the Court.

In this case, as in No. 702, just previously decided, because of constitutional questions the case was brought here by direct writ of error with the object of reviewing and reversing a conviction and sentence under an indictment charging an unlawful conspiracy to induce persons whose duty it was to register under the Selective Draft Law not to perform that duty and alleging overt acts done for the purpose of carrying out the illegal conspiracy. The defenses were substantially the same as those urged in the previous case and the assignments of error made at the time of the allowance of the writs were identical. In fact at bar the propositions and arguments relied upon in the previous case were stated to be controlling in this. But, therefore, for the fact that there was different evidence in the two cases the considerations which control the one control the other. No distinction, however, results from that difference since we are of opinion in this case as we were in the other after an examination of the entire record that the contention that there was no evidence tending to show guilt and hence the case should have been taken from the jury is without merit.

As thus any conceivable distinction between the two cases is removed, it follows that for the reasons stated in the *Goldman* case, just decided, and in the *Arver* case, *ante* p. —, as to the constitutional questions, the judgment below in this case must be and it is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 738.—October Term, 1917.

Albert Jones, Appellant, *vs.* H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond County, Georgia.	Appeal from the District Court of the United States for the Southern District of Georgia.

[January 7, 1918.]

Mr. Chief Justice White delivered the opinion of the Court.

Jones, the appellant, was arrested under a warrant charging him with a failure to register as required by the Act of Congress of May 18, 1917, known as the Selective Draft Law. (Public No. 12, 65th Congress, c. —, — Stat. —), and after a hearing by a United States Commissioner was committed to custody to await the ensuing term of the United States District Court. Alleging that he was illegally restrained because the statute under the assumed authority of which he was held was repugnant to the Constitution of the United States, he petitioned the court below for a writ of *habeas corpus*. Following a rule to show cause and a hearing on the return thereto the petition was denied on the ground that the statute was constitutional (243 Fed. Rep. 997), and to reverse the order so adjudging this direct appeal was prosecuted.

It is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and *habeas corpus* should not be granted in advance of a trial. *Riggins* v. *United States*, 199 U. S. 547; *Glasgow* v. *Moyer*, 225 U. S. 420. *Johnson* v. *Hoy*, 227 U. S. 245. If that rule applied, therefore, our duty would be to affirm unless this case could be treated as coming within the exceptional class. But we do not deem it necessary to enter into that consideration because even if it were found to be embraced in such class every constitutional question relied upon has been this day in *Arver* v. *United States*, *ante*, p. —, decided to be without merit. Because of this situation, therefore, without departing from the general principle, we think it suffices in this case to apply the ruling made in the *Arver* case and for the reasons stated in the opinion therein, to affirm.

And it is so ordered.